Supreme Court, U.S.
FILED
051533 MAY 22 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

GIFFORD BROTHERS SAND & GRAVEL, INC.,

Petitioner,

v.

TOWN OF BARNSTABLE, MASSACHUSETTS,
ZONING BOARD OF APPEALS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

JAMES W. STATHOPOULOS
43 Kingston Street
Boston, Massachusetts 02111
(617) 423.0001

Attorney for Petitioner

201331

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Is the Respondent's municipal zoning ordinance unconstitutional and/or spot zoning?

2. Was there a pre-existing non-conforming use and is the failure of the Massachusetts appellate Courts to remand for consideration of newly discovered evidence which is compelling, disinterested and dispositive on that issue an obvious violation of due process?

3. Are cease and desist orders prohibiting any and all commercial uses at said premises an inverse condemnation of the premises, especially where the premises are thereby rendered completely useless for residential purposes?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Gifford Brothers Sand & Gravel, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
TABLE OF APPENDICES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	10

TABLE OF CITED AUTHORITIES

Page

Cases:

First Lutheran Church v. Los Angeles County,
482 U.S. 304 (1987)
107 S. Ct. 2378 ..... 5, 8

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 5, 8

Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978) 5, 7

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986)
106 S.Ct. 925 7

Statutes:

28 U.S.C. § 1257 1

Constitutional Provisions:

U.S. Const. Amend. V 2, 7

U.S. Const. Amend. XIV 2, 7

TABLE OF APPENDICES

Page

Appendix A — Memorandum And Order Of The Commonwealth Of Massachusetts, Appeals Court Entered October 28, 2002 ..... 1a

Appendix B — Findings Of Fact, Rulings Of Law And Order For Judgment Of The Commonwealth Of Massachusetts Dated June 25, 1999 ..... 7a

Appendix C — Order Of The Supreme Judicial Court For The Commonwealth Of Massachusetts Denying Further Appellate Review Dated December 21, 2005 ..... 26a

Appendix D — Affidavit Of Francis Rennie Dated September 7, 2005 ..... 27a

Appendix E — Affidavit Of Robert H. Ellis Dated December 29, 2003 ..... 29a

Petitioner Gifford Brothers Sand & Gravel, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in this case.

OPINIONS BELOW

The FINDINGS OF FACTS, RULINGS OF LAW AND ORDER FOR JUDGMENT of the trial court, the Barnstable County Superior Court of the Commonwealth of Massachusetts are reproduced in the Appendix at App. 7a. The MEMORANDUM AND ORDER PURSUANT TO RULE 1:28 of the Appeals Court of the Commonwealth of Massachusetts are reproduced in the Appendix at App. 1a. The notice of DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW by the Supreme Judicial Court of the Commonwealth of Massachusetts is reproduced in the Appendix at App. 26a.

JURISDICTION

The decision of the trial court was entered June 25, 1999. Both parties appealed. The Appeals Court of the Commonwealth of Massachusetts entered a decision on October 28, 2002. Petitioner filed a Petition for Rehearing with the Appeals Court which denied said petition. The Supreme Judicial Court of the Commonwealth of Massachusetts denied Further Appellate Review on December 21, 2005. An application to Extend the time to file a Petition for a Writ of Certiorari was timely filed and an extension was granted until May 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation".

2. The Fourteenth Amendment to the United States Constitution, §1, provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT

Petitioner seeks review of the ruling of the Supreme Judicial Court of the Commonwealth of Massachusetts which, by denying relief, adopted the position of the Appeals Court which had 1) overturned the trial Court's decision that preexisting nonconforming commercial uses of Petitioner's premises predated zoning and 2) essentially inversely condemned the premises by precluding all commercial activity, the only viable uses for the last eighty-five years, thereon.

The petition arises out of a dispute between the parties as to the commercial uses of a parcel of land (hereinafter, "premises"). For decades, Petitioner and its predecessors in title mined sand and gravel therefrom and also utilized the premises as a junkyard and contractor's yard. In the early

1960's, Petitioner's predecessors in title had received permitting for the construction of an automotive recycling garage on an adjacent parcel where said predecessors also had a residence in which they were domiciled. This adjacent parcel is totally unrelated to Petitioner's title to the premises which are the subject of this action. Respondent however, contends that the permitting of the adjacent parcel has extinguished the rights to all commercial uses in the premises. Since the commercial uses at the premises began around the turn of the century (1900), same have continued uninterrupted until the present day.

Respondent Town, after determining in the mid-1990's that the Petitioner's gravel pit use was valid (Paragraph 18 of the trial Court's decision at App. 12a), purchased from Petitioner and removed tens of thousands of tons of sand and gravel from Petitioner's premises for the purpose of covering Respondent's landfill. Thereafter, Respondent issued a Cease and Desist Order claiming that the Petitioner's sand and gravel pit was an illegal use. Respondent was upheld by the Respondent's own ZBA, and Petitioner brought suit claiming valid pre-existing commercial uses and inverse condemnation.

This case was originally tried before Justice Gary Nickerson in the Barnstable Superior Court. Justice Nickerson found the Respondent's 1929 zoning bylaw (Footnote 2, loc. cit. at App. 11a) to be unconstitutional and hence invalid. In Paragraph 4 at App. 15a), he ruled that the road which provided frontage to the premise "was nothing more than a cartpath in the woods" and that the premises "would have been residential inasmuch as there was no commercial use of the property until the gravel pit came into being in the late 1940's". He held Respondent's 1956 zoning bylaw to be applicable and found valid certain nonconforming uses maintained on the premises by Petitioner. The Massachusetts Appeals Court determined (Memorandum

and Order pursuant to Rule 1:28 at App. 5a) Respondent's 1929 municipal zoning ordinance to be valid and held Petitioner's commercial use of the property post 1929 to be non-conforming and illegal. Because the premises had been used so commercially intensively (sand, gravel, demolition, automotive recycling, etc.) for such a long period, Petitioner contended that residential options were impossible (the status quo being a large sandpit/ junkyard with thousand of tons of buried stumps, vehicles, tires and building demolition) and also contended that the modifications of the Appeals Court have effectively precluded all use of any kind. During the time period from the trial of this matter through the time of oral argument at the Appeals Court, Petitioner's previous counsel (the original trial counsel) had suffered a debilitating mental breakdown, serious enough to preclude his from the practice of law and in fact all employment of any kind. Subsequent to withdrawal of said former counsel, Petitioner and current counsel performed an extensive search for evidence to substantiate the position that commercial uses at the premises had been ongoing prior to the time of Respondent's 1929 zoning ordinance. Two disinterested witnesses (one of which had been a municipal health department official for approximately thirty years) were located, and their independent Affidavits (at App. 27a and 29a) set forth in great detail their observations and memories of the commercial activities ongoing at the premises in the early to mid-1920's. The original Affidavits were provided to the Supreme Judicial Court of the Commonwealth of Massachusetts by appending same to the Petitioner's Application for Further Appellate Review. The Supreme Judicial Court denied Petitioner's application for Further Appellate Review.

REASONS FOR GRANTING THE PETITION

A. The Respondent's 1929 Zoning Ordinance is Unconstitutional

The ordinance in its entirety is set forth in Footnote 2 of the Trial Court decision (App. 11a). Its language is plain. It sets up numerous non-residence districts for individual parcels where commercial activity was ongoing at the time of the enactment of the ordinance. The remainder of the town is zoned residential. Clearly this is spot zoning and, as the Trial Court pointed out in Paragraph 4 (App. 14a) of its decision, the same is unconstitutional. The Appeals Court attempt to re-characterize the language of the ordinance cannot resurrect the ordinance nor its effect on property rights. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) 107 S. Ct. 2378. Respondent's zoning ordinance did not zone the entire town residential leaving existing non-conforming uses in a grandfathered status; rather the ordinance spot zoned hundreds of parcels. This is patently unconstitutional and in violation of the Fifth and Fourteenth Amendments in regard to due process and just compensation.

B. The Failure To Remand The Case To The Trial Court For Additional Evidence and Findings On The Issue Of Pre-existing Nonconforming Commercial Use Is A Violation Of Due Process

Other than the finding of that premises frontage road was a "cartpath in the woods" (App. 15a) there was no evidence adduced by either party as to commercial activity pre-existing the Respondent's 1929 zoning ordinance. In 1929, except for a handful of exceptions, no roads in the Town of Barnstable or anywhere on the Cape Cod peninsula for that matter, were other than dirt/gravel ways. Certainly none were paved at the outskirts of town where the premises are located, which premises in fact abut the adjacent Town of Sandwich, Massachusetts. As late as the 1960's the premises actually included land in said Sandwich prior to being conveyed to a third party surveyor. The mere fact that the frontage road was dirt/gravel is not sufficient as a matter of law to warrant the conclusion that there was no ongoing commercial use at that time.

The Trial Judge, having found the 1929 statute unconstitutional, was unconcerned with pre-1956 (the year of the earliest ordinance of Respondent that the Trial Judge found valid) commercial activity, and therefore his findings are cursory on that issue. The Judge correctly opined that the commercial uses did have validity and made an order to that effect. By the time of the Petitioner's Application for Further Appellate Review to the Supreme Judicial Court of the Commonwealth of Massachusetts, additional clear, convincing and relatively irrefutable evidence of the commercial use of the premises pre-dating the 1929 ordinance was located, memorialized by sworn affidavit and presented to the high Court. It is also clear that Petitioner's

previous counsel, trial counsel, had been suffering from serious mental disability and should have more effectively investigated and presented appropriate evidence on this point. In order to effectuate justice and adhere to due process the matter should have been remanded to the Trial Court for further evidentiary proceedings. *See* Fifth and Fourteenth (§1) Amendments to the U.S. Constitution, and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) 106 S. Ct. 925. With the Supreme Judicial Court clearly aware, prior to its decision, that the overwhelming state of the most current evidence available confirmed that non-conforming pre-existing commercial uses were being conducted on Petitioner's premises prior to the earliest of Respondent's zoning ordinances, the Court's failure to remand for further evidentiary proceedings is patently unjust and falls short of due process.

C. Is the preclusion of all commercial uses tantamount to preclusion of all uses and in fact, inverse condemnation in violation of the Fifth Amendment.

There is no doubt that the decisions of the Massachusetts Appeals and Supreme Judicial Courts do prohibit all uses of the property. The premises cannot be used for residential purposes because same have been tainted and contaminated for five score years as a gravel pit, contractor's yard and junkyard and also because there are thousands of tons of extremely undesirable materials buried throughout the property.

In the case of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) this Court found no taking but explained the requirements for so finding and the instant case of Gifford satisfies those requirements in that all uses of any

kind have been precluded. *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992):

> It seems unlikely that common law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they state law to be dealt with on remand. We emphasize that, to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation. . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 112 S.Ct. 2886.

and the case of *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) 107 S. Ct. 2378:

> Under the Just Compensation Clause, where the government has taken" property by a land-use regulation, the landowner may recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property. The Clause is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision

with respect to compensation. While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation. Once a court determines that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. But where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

JAMES W. STATHOPOULOS
43 Kingston Street
Boston, Massachusetts 02111
(617) 423.0001

Attorney for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM AND ORDER OF THE COMMONWEALTH OF MASSACHUSETTS, APPEALS COURT ENTERED OCTOBER 28, 2002

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

00-P-701

GIFFORD BROTHERS SAND AND GRAVEL, INC.

vs.

ZONING BOARD OF APPEALS OF BARNSTABLE.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

Gifford Brothers Sand and Gravel Inc. (Gifford) appeals from a judgment of the Barnstable Superior Court holding that Gifford must limit its excavation and fill-processing use of the property on Wakeby Road to the five acre area in such use as of 1956. The zoning board of appeals of Barnstable (board) has filed a cross appeal arguing that this activity was not a legal preexisting nonconforming use under the zoning by-law enacted in 1929, and therefore no such continued activity is proper. We conclude that the Superior Court erred in applying the 1956 zoning by-law rather than the applicable 1929 zoning by-law.

Background. Gifford is the current owner of the property at issue, an irregularly shaped 16.6 acre lot located at 810 Wakeby Road in Marstons Mills, a village of the town of Barnstable. The town enacted its first comprehensive zoning

by-law in 1929, at which time the property was zoned for residential use. The second zoning by-law at issue, enacted in 1956, added a business district but the Gifford property continued to be zoned only for residential purposes. In spite of being zoned for only residential use, the property has been used for various purposes over the years. When Lorenzo Gifford acquired the property in 1945, the property was woodland, neither in commercial nor residential use. By 1947, the Giffords had begun commercially removing sand and gravel from the property. Until 1995, the sand and gravel operation occupied only a small portion of the property, at most five acres, and the Gifford's primary business on the property was the repair and salvage of automobiles, for which a use variance was secured from the board in 1964.[1] (A.405, 426, 658).

In 1996, a contractor for the town of Barnstable contracted with Gifford to use fill from the Wakeby Road property to cap the Barnstable landfill. Before Gifford began harvesting this gravel, the Barnstable building commissioner advised the town council that the gravel operation was a lawful preexisting non-conforming use.[2] Thereafter, mining

---

1. In addition to the metal salvage operation, portions of the property along the western border were frequently leased to local businesses for the storage of heavy equipment, tools, trailer bodies, and boats.

2. "Please be advised that the Gifford [g]ravel pit on Wakeby Road is a pre-existing non-conforming use, and as such is lawful from a zoning perspective. In arriving at this conclusion, we talked to several people with early roots in the area, and interviewed the owner. No information was received to the contrary." (A.674).

and excavation activities were increased and the buffer of trees between the excavation and the boundary of the property was stripped away, exposing the gravel pit to the residential neighborhood. Once the contract to provide the fill was completed, Gifford began to use the property in connection with a landscaping and loam processing business. The premises quickly became a repository for brush stumps, concrete and demolition debris.

After receiving several complaints about the constant noise, dust and fumes resulting from the various operations conducted on the property, the Barnstable building commissioner issued a cease and desist order directing Gifford to stop using the property as a gravel pit and to stop processing fill and depositing fill, brush and clippings. Gifford appealed the order to the board, which held appropriate hearings and then upheld the building commissioner. Thereafter, Gifford sought relief from the order in Barnstable Superior Court.

The Superior Court concluded that the 1956 zoning by-law was applicable rather than the 1929 by-law, which it found to run afoul of the zoning enabling act of that era[3] as illegal spot zoning, and so held that Gifford has the right to mine that portion of the site appropriated to gravel mining as of 1956, the southernmost five acres of the site.

---

3. The zoning enabling act applicable at that time was inserted by St.1920, c. 601, codified as G.L. c. 40, §§ 25-30B, since repealed by St.1954, c. 368, § 1, and now appearing in Chapter 40A; see also *Opinion of the Justices to the House of Representatives*, 234 Mass. 597, 127 N.E. 525 (1920).

Appendix A

Both parties have appealed this order.[4] The board argues that the 1929 zoning by-law is not spot zoning and was the correct by-law to apply. Under this theory, excavation and mining activities on the property were never legal because no zoning relief for such use was ever issued, nor were such activities taking place on the property in 1929 when the by-law took effect which would have given them status to continue as a legal preexisting nonconforming use.

Spot zoning. Spot zoning occurs where a local legislative body grants a zoning classification to a piece of land that singles out that particular parcel "for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot," *Rando v. North Attleborough*, 44 Mass.App.Ct. 603, 606, 692 N.E.2d 544 (1998), quoting from *Whittemore v. Building Inspector of Falmouth*, 313 Mass. 248, 249, 46 N.E.2d 1016 (1943), or when the zoning classification, without a rational planning objective, makes the parcel subject to more restrictive regulation than that of neighboring property. *National Amusements, Inc. v. Boston*, 29 Mass.App.Ct. 305, 312, 560 N.E.2d 138 (1990). "Such zoning constitutes a denial of equal protection under the law guaranteed by the State and Federal Constitutions, and violates the uniformity requirement of c. 40A, § 4." *Rando, supra* at 606, 692 N.E.2d 544 (citations and internal quotation marks omitted).

---

4. The board has also appealed other rulings which are dependant upon the application of the 1956 zoning by-law. As we conclude that the 1929 by-law was applicable, we do not reach these arguments.

Appendix A

The 1929 by-law was a complete by-law enacted pursuant to the then applicable zoning enabling act. The 1929 by-law applied to the entire town and was an effort to preserve the residential nature of the town while at the same time complying with the requirement that existing structures and uses be given legal nonconforming status. See St.1920, c. 601, § 7. The 1929 by-law provides that all property in Barnstable is in a residential zoning district unless a permit is afforded otherwise. This type of zoning is permissible. See *Gage v. Egremont*, 409 Mass. 345, 348, 566 N.E.2d 597 (1991) (general laws do "not direct that every municipality adopting a zoning by-law have more than one zoning district or that such a by-law permit business uses as of right in some part of the municipality"). The 1929 zoning by-law is not spot zoning and should have been applied by the court below.

When the 1929 by-law is applied, all commercial activity, with the exception of automobile salvage, is prohibited on the property. The property was never subject to any special "existing use" status conferred by the applicable zoning enabling act, because in 1929 the property was woodland; nor was zoning relief ever issued for commercial use other than the salvage of automobiles. Without zoning relief the property may not be, and never legally was, used as a gravel pit or as a place to commercially process fill, or for depositing fill, brush or clippings.

The only permitted uses on the property are single-family residential use and automobile salvage, consistent with the terms of the previously issued use variance and special permits. Having so found, we need not address the remaining issues brought on appeal.

Appendix A

The judgment of the Superior Court is modified by striking the clause in paragraph 1 that begins with "except" and ends with "1956." As so modified, the judgment is affirmed.

So ordered.

By the Court (Gelinas,
Kantrowitz & Doerfer, JJ.),

s/ [illegible]
Clerk

Entered: October 28, 2002

APPENDIX B — FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS DATED JUNE 25, 1999

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss. SUPERIOR COURT
No. 98-87

GIFFORD BROTHERS
SAND AND GRAVEL, INC.

vs.

ZONING BOARD OF APPEALS,
TOWN OF BARNSTABLE

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

This is an action brought by the plaintiff pursuant to G.L. c. 40A, § 17, seeking to overturn the decision of the Barnstable Zoning Board of Appeals ("Board"), which upheld the building commissioner's order that the plaintiff cease business activity at its property on Wakeby Road. The complaint contains additional counts for declaratory relief and damages due to an allegedly unconstitutional taking without compensation effected by the Town of Barnstable's ("Town") application of the zoning by-law to the Property. The case was tried over the course of three days, April 27-29, 1999. This court viewed the Property. Based on all of the credible evidence, the court enters the following findings of fact.

Appendix B

FINDINGS OF FACT

1. Plaintiff, Gifford Brothers Sand and Gravel, Inc. is a corporation-organized under the laws of the Commonwealth of Massachusetts and is the principal owner of the subject Property.

2. The Property consists of 16.6 acres and is located at 810 Wakeby Road in Marston Mills, a village of the Town of Barnstable. The tract is irregular in shape running north some 1,550 plus feet from its frontage on Wakeby Road.

3. Lorenzo Thatcher ("L.T.") Gifford, acquired the Property by deed from his uncle, Charles Gifford, in 1945.

4. In 1945, the Property was woodland, not in commercial or residential use. By 1947, L.T. Gifford had begun commercially removing sand and gravel from the Property.

5. During his years of ownership, L.T. Gifford used the Property for a variety of enterprises. Upon his death in 1972, L.T.'s sons, William and Maynard Gifford, continued in their father's ways.

6. From 1947 through 1995, sand and gravel was mined on the Property for sale and removal to other sites. The original gravel pit was about 300 feet north of Wakeby Road. The area is clearly depicted on an aerial photograph taken in 1964 (Exhibit no. 25). Sometime after 1964 sand and gravel operations moved deeper into the tract on a path northward of the original pit. By 1988, gravel was being removed in an area about 750 feet north of Wakeby Road.

Appendix B

7. Insufficient evidence was presented documenting the frequency and value of mining operations between 1947 and 1995 to enable this court to accurately determine the extent of the Giffords' business. Nonetheless, one pertinent fact is clear: the business, while not operated on a daily basis, was continual.[1] At least as to the elder Gifford, the pit business was a cash-in-pocket operation.

8. The Giffords used excavation equipment to dig the material, a mechanical screener to sort it, and large trucks to haul the finished product.

9. At any one time prior to 1995, the sand and gravel operation occupied but a small portion of the Property, at most five acres. The Giffords' primary business was the repair and salvage of automobiles. Numerous junk vehicles were placed on the Property, more or less concentrated along the easterly side of the Property mid-way back from Wakeby Road. Near to Wakeby Road, buildings were erected to accommodate the repair and salvage business. A welding shop was maintained in the buildings. The repair and salvage trade was a use secured by variance from the Zoning Board in 1964.

10. During the Giffords' tenure, portions of the Property were leased to local business for the storage of heavy

1. No evidence was offered to show that the business complied with, or failed to comply with, the Town's earth removal by-law. Municipalities in Massachusetts were enabled to create such a specific by-law by statute added in 1949. See G.L. c. 40, § 21(17). Barnstable enacted such a by-law. Because no discussion was offered by the parties on the subject, this court also declines comment, as it is not determinative here.

equipment, tools, trailer bodies, boats, etc. This activity was concentrated along the westerly side of the Property in the first few hundred feet from Wakeby Road.

11. The northernmost portion of the Property was largely unused until the 1980's. Wood roads, the handiwork of the Giffords, crisscrossed the acreage, but no relation between the wood roads and the gravel pit was proven to this court's satisfaction at trial. Around 1987 or 1988, William Gifford removed the trees and topsoil in the northwest quadrant of the Property [See aerial photo of 1989, exhibit 21].

12. On occasion prior to 1995, construction debris, stumps and brush were buried on the Property.

13. By 1995, plaintiff was in control of the Property. The summer of 1996 brought a significant change to the land. The Town was in the process of capping its landfill (the "town dump"). The contractor for the project entered into an agreement with plaintiff to secure fill from the Property. During a four-month period approximately 150,000 tons of gravel was removed. The northwest quadrant of the Property yielded the bulk of the fill. Along the northwest boundary mining operations were taken to, and in spots over, the property line. Along the northeast property line the excavation advanced towards the residential neighborhood of Mockingbird Lane. The buffer of trees between the excavation and the property line was removed. Families living along the southwest side of Mockingbird Lane bore the brunt of the full scale mining operation. Their homes were coated with dust, the ground and buildings shook from the use of heavy equipment, and their waking and sleeping hours were interrupted by noise.

Appendix B

14. The Town of Barnstable enacted a primitive zoning by-law in 1929.[2]

---

2. The by-law, Article 10, stated:

> The Town of Barnstable is hereby divided into districts, subject to the provisions hereinafter stated, to be known respectively as non-residence districts and residence districts as follows: Non-residence Districts subject to change as hereinafter provided, shall compromise all lands which At the time this By-law becomes effective are used for any business or industry other than farming, truck gardening, the growing of trees, shrubs, vines or plants, and the raising of animals. Residence Districts, subject to change as hereinafter provided shall comprise all areas not included in Non-residence Districts. Subject to the provisions hereinafter stated, no parcel of land lying in any Residence District and not at the time this By-law becomes effective devoted to any business or industry, or for any purpose except for residence or purposes of buildings appurtenant thereto, or for churches, schools and similar non-commercial or non-industrial buildings, and no permit shall be issued for the erection, alteration or conversion of any building for or to any such prohibited use upon any such parcel, except as hereinafter provided. A permit may be issued for the erection in any residence district of a building for the purpose of any business or industry or for the alteration or conversion of a building in such district for or to such purposes, if the Selectmen shall after public hearing so order, provided that no such permit shall be granted except upon written application and after a public hearing of parties interested and consideration of their evidence by the Selectmen; notice

(Cont'd)

Appendix B

15. In 1956, the Town revised the zoning by-law to place the Property in a residential zone. The current zoning by-law continues that designation, now known as an RF zone [See Exhibit no. 3A].

16. In 1961, William Gifford filed an application with the Board for a variance to allow the storage of used cars and auto parts on a portion of the Property. The request was denied.

17. In 1964, L.T. Gifford applied for and obtained a variance to operate an auto salvage business on a portion of the premises. In 1969, the Board granted Gifford permission to construct a building on the premises for use in the auto salvage business.

18. On March 13, 1996, as a prelude to the harvesting of gravel to cap the Town's landfill, the building commissioner wrote to Town Counsel as follows,

> "Please be advised that the Gifford gravel pit on Wakeby Road is a pre-existing non-conforming use, and as such is lawful from a zoning

---

(Cont'd)

> of said hearing being given by publication of the time and place thereof in a local newspaper not less than two weeks before said hearing, the expense of such publication to be borne by the petitioner. After such hearing the Selectmen shall render a decision in writing, stating the decision and the reasons therefor and file the decision with the Town Clerk and send a copy thereof to the applicant. (Exhibit no. 9).

perspective. In arriving at this conclusion, we talked to several people with early roots in the area, and interviewed the owner. No information was received to the contrary." [Exhibit no. 31].

19. On May 9, 1997, the building commissioner issued a written Cease and Desist Order directing plaintiff to stop transporting wood materials to the Property and to stop processing such materials at the site [Exhibit no. 1].

20. On October 22, 1997, the building commissioner issued a written Cease and Desist Order directing plaintiff to stop the use of the Property as a gravel pit and to stop the processing of fill, the screening of fill, and the depositing of fill, brush and clippings [Exhibit no. 2].

21. From the latter Order, plaintiff took an appeal to the Board. After appropriate hearings, the Board issued its written decision on January 27, 1998 upholding the building commissioner [Exhibit no. 17]. The present action followed in its wake.

22. The Board found, *inter alia*, that:

> . . . [T]here has been evidence presented to the Zoning Board of Appeals which would indicate that at one time, this lot was, in fact, used as a gravel pit . . . No findings are made on whether or not it was ever a legal pre-existing non-conforming use . . . It was a gravel pit, prior to the adoption of zoning in that area, which is purported to be 1956 . . . The gravel operation on

this site expanded beyond the original non-conforming use — assuming that the use was legally non-conforming to an area enveloping almost the entire lot . . . There is evidence of serious erosion on this property which if allowed to continue will result in significant concern for public safety and public health.

RULINGS OF LAW

1. This is an action brought pursuant to G.L. c. 40A § 17. There is no dispute as to plaintiff's standing to bring this action as an aggrieved party. His status is well recognized. G.L. c. 40 § 11; also see, e.g, *Shriners' Hosp. for Crippled Children v. Boston Redevelopment Authy.*, 4 Mass. App. Ct. 551, 555 (1976).

2. In an abundance of caution, plaintiff sought relief under G.L. c. 40A § 17 (Zoning Act) and alternatively G.L. c. 231A (declaratory judgment). While the latter is an available remedy, the former is preferred. See generally *Clark & Clark Hotel Corp. v. Building Inspector of Falmouth*, 20 Mass. App. Ct. 206 (1985). As such, this court proceeds under the Zoning Act.

3. The court has conducted a trial de novo in accordance with the mandate of the statute and case law. G.L. c. 40A § 17; *39 Joy Street Condominium Ass'n v. Board of Appeal of Boston*, 426 Mass. 485, 488 (1998).

4. The Board first argues that the Property was governed by the 1929 zoning by-law, and therefore the gravel pit was

never a legal use. In 1929, Wakeby Road was nothing more than a cart path through the woods. If the by-law did control, the Property would have been deemed residential inasmuch as there was no commercial use of the Property until the gravel pit came into being in the late 1940's. Under this theory, the gravel pit, without a variance, was an illegal non-conforming use under the 1929 by-law, and therefore remained an illegal use under the 1956 by-law. Interestingly enough, the Board seems to have ignored the 1929 by-law in its own decision, having ruled that zoning first took effect in 1956. This Court has great difficulty in interpreting the language of the by-law in order to determine if it applied to the use in question on the premises in question. Issues of interpretation need not be resolved however, for the by-law suffers from a more basic problem. The by-law simply categorized the de facto use of each parcel of land in the Town in 1929 and thereby sorted each parcel into either a business or residential zone. As applied, such a parcel by parcel setting of zoning districts effects a result where contiguous lots, which are alike in every aspect except one was in commercial use and the other in residential use in 1929, would be zoned differently. In effect, the Town created an oligopoly for pre-existing business interests in Town. Such economic advantage created by zoning runs afoul of the zoning enabling act of the era, and is now known as "spot zoning." G.L. c. 40 § 25, as added by St.1920 c. 601, §§ 1, 2, and amended by St.1925 c. 116 § 1; *Opinion of the Justices to the House of Representatives*, 234 Mass. 597 (1920). Also see *Smith v. Board of Appeals of Salem*, 313 Mass. 622, 624-25 (1943); *Leahy v. Inspector* of *Buildings of New Bedford*, 308 Mass. 128, 132-34 (1941) (zoning districts must be substantial contiguous areas, not individual parcels). Because

the 1929 by-law was beyond the authority of the Town and invalid as applied to the Property, this court finds that the by-law does not govern the outcome of this case. See *Cross v. Planning Board of Chelmsford*, 345 Mass. 618, 620 (1963).

5. No such problem exists with the zoning by-law adopted by the Town in 1956, which placed the Property in a residential zone. Being in a residential zone, the gravel pit was rendered non-conforming under the new by-law, but was entitled to the grandfather rights accorded legal pre-existing uses by mandate of the then-existing Zoning Enabling Act, G.L. c. 40A §§ 3, 5 & 11, as added by St.1954, c. 368 § 2 (1954). Under the 1956 by-law, the gravel pit was a legal pre-existing non-conforming use.

6. At the introduction of the 1956 by-law, the gravel pit was a small operation covering at most five acres near Wakeby Road [See Exhibit no. 26]. The current by-law provides for the expansion of a pre-existing non-conforming use by means of a special permit (§ 4-4.5(2)). Plaintiff has not sought a special permit, but instead contends that it can expand the gravel pit as a matter of right to the boundaries of the Property.

7. During the post-World War II building boom, the suburban towns of Massachusetts gave rise to a flurry of appellate decisions on the application of zoning law to gravel pits. *Town of Wayland v. Lee*, 331 Mass. 550 (1954) ("*Wayland II*"); *Town of Wayland v. Lee*, 325 Mass. 637 (1950) ("*Wayland I*"); *Town of Billerica v. Quinn*, 320 Mass. 687 (1947); *Town of Burlington v. Dunn*, 318 Mass. 216 (1945). Little has been written directly on point since. In the

shadow of these cases, plaintiff argues on factual and legal grounds, respectively that: 1) the gravel pit was originally sited for the entire parcel and therefore can be extended to its boundaries within the legal non-conforming use established thereby, or 2) that the law allows the extension of a gravel pit beyond its original use because of the very nature of the enterprise.

8. In regards to its factual argument, plaintiff has failed to establish that as of 1956, the entire parcel had been appropriated to use as a gravel pit. See *Town of Billerica,* supra. On the contrary, this Court finds that the Giffords intended multiple uses for the parcel. The auto salvage operation was established along the eastern boundary of the lot. By the terms of the variance it was to be screened from view by the surrounding woodland owned by the Giffords. No test borings were done, no clearing of the back land was accomplished; in short, no provisions were evident circa 1956, indeed prior to 1985, suggesting any intent to use a substantial portion of the premises for screening gravel. Plaintiff has not proven the right to expand the pit under the *Billerica* doctrine. Compare *Township of Fairfield v. Likanchuk's, Inc.*, 644 A.2d 120,124-25 (N.J. Super. 19 .).

9. Turning to plaintiff's legal argument, this court relies on two more recent decisions which have established the protocol for evaluating the permissibility of non-conforming uses. *Powers v. Building Inspector of Barnstable*, 363 Mass. 648 (1973); *Bridgewater v. Chuckran*, 351 Mass. 20 (1966). "The first test is whether the present use reflects the nature and use prevailing when the zoning by-law took effect. . . . The second test is whether there is a difference in the quality

or character, as well as the degree of the present use . . . The third test is whether the current use is different in kind in its effect on the neighborhood." *Powers*, supra, at 663; see *Chuckran*, supra, at 23. On appeal to this court, plaintiff has the burden to prove compliance with the *Powers/Chuckran* three-part test. *Derby Refining Co. v. Chelsea*, 407 Mass. 703, 712 (1990).

10. In spite of this evolving line of precedent, plaintiff argues that the so-called "diminishing assets" doctrine of other jurisdictions should apply, which creates an exception to the normal *Powers/Chuckran*-like framework for gravel, earth, or other diminishing land asset removal operations. See *Moore v. Bridgewater Township*, 173 A.2d 430, 437 (N.J. Super. 1961). The general rationale behind the doctrine is that in a quarrying or earth removal business, the land itself is an asset, which by the very nature of the operation, diminishes over time. The use cannot begin over the entire tract of land at once, and is therefore naturally expansive. The jurisdictions which allow the exception note that disallowing expansion would be tantamount to disallowing the use. Our own Supreme Judicial Court noted the harsh effect of standard zoning interpretation as to gravel pits in *Wayland II*: "The defendants [Town of Wayland] contend that [Massachusetts law] limits [the plaintiff] to the excavation of pits or holes that have already been excavated and now contain nothing but air. Such an absurd result was not contemplated by this court. . . ." Supra, at 551.

That said however, Massachusetts does not recognize the diminished assets doctrine as accepted by other jurisdictions and argued by the defendants, nor does this court

believe the facts presented herein warrant its adoption. *Wayland I*, supra; *Town of Billerica*, supra. Of the states in which the question has arisen, it appears only Massachusetts and Connecticut do not apply the doctrine in some form. See *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County*, 907 P.2d 1324, 1337 (Cal. 1996) (discussion of varied approaches to diminishing assets across jurisdictions); *Teuscher v. Zoning Board of Appeals*, 228 A.2d 518 (Conn. 1967) (Connecticut Supreme Court declines to apply diminishing assets doctrine). At its extreme, the doctrine allows a landowner to use the entire area of a gravel bed (or other mined product) without creating an unlawful extension of a nonconforming use, not just the area in which operations were being conducted when the by-law was adopted. See, e.g., *Blom v. St. Louis County Planning Commission*, 1999 WL 10241 (Minn.App. Jan 12, 1999). Other states look to the bounds of the property owned at the time of the by-law adoption, rather than the bounds of the asset, and therefore extend the exemption of the existing nonconforming use to the property bounds. *Hansen Brothers Enterprises, Inc.*, supra, at 1337. Still other states have mitigated the effects of the diminishing assets doctrine by allowing expansion of earth removal to a certain distance from the property line, creating a buffer zone for abutters, or allowing expansion only within a set percentage of the land. See *Flanagan v. Town of Hollis*, 293 A.2d 328, 329 (N.H. 1972).

It is interesting to note, however, that many states which are thought of as "diminishing assets" states still limit the doctrine to cases where it can be shown that the objective intent to mine the entire parcel predated the zoning by-law in question, using reasoning similar to the Supreme Judicial Court's in the

Billerica and *Wayland II* cases. See *Township of Fairfield, supra,* at 329, quoting *Moore, supra.* "[I]n such cases the owner must show that the entire tract was 'dedicated' to the mining activity despite the fact that the activity was limited when it was rendered a nonconforming use. The mere unexpressed intention or hope of the owner to use the entire tract at the time the restrictive ordinance is adopted is not enough. Intent must be objectively manifested. . . ." Id, at 329 (citations omitted).[3]

Massachusetts precedent also looks to objective manifestations of mining intent, limiting expansion within "the exact boundaries of the area devoted to those [mining pits]" present at the time the restrictive ordinance or by-law was adopted. See *Wayland II*, supra, at 552. The major difference between Massachusetts and the so-called "diminishing assets" jurisdictions, however, is that our courts are adverse to exempting gravel pit cases from the *Powers/ Chuckran* framework, allowing objective intent to mine to only factor into the first prong of the test, rather than allowing the use of a diminishing asset to be determinative. See *Wayland II*, supra; *Wayland I*; supra; *Town of Billerica*, supra; *Town of Burlington*, supra.

Our judicial and legislative history support this conclusion. In 1949, the Legislature recognized the special problem of earth removal, and enacted a statute to specifically allow municipalities to regulate such operations. G.L. c. 40 § 21 (17), as added by St.1949, c. 98. In 1956, the Supreme Judicial Court foreshadowed its inclination toward the minority view with the dicta: "There is no constitutional right

3. It is interesting to note that plaintiff here relies on the *Moore* case.

to convert wild land into waste land." *Town of Lexington v. Simeone*, 334 Mass. 127, 130 (1956). Since then, our courts have adhered to the notion that "whatever harshness might result from strict regulation of changes in nonconforming uses is justified by policy considerations which generally favor their eventual elimination." *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32, 39 (1991). See also *Strazzulla v. Building Inspector of Wellesley*, 357 Mass. 694, 697 (1970); *Dowling v. Board of Health of Chilmark*, 28 Mass. App. Ct. 547, 551 (1990).

11. Therefore, applying the requisite test in light of the above discussion, this court concludes that plaintiff has not proven a permissible expansion of its nonconforming use on the Property. This court does agree with plaintiff that the nature and purpose of the use, i.e. commercial gravel removal, remains the same as pre-1956 operations. Compare *First Crestwood Corp. v. Building Inspector of Middleton*, 3 Mass. App. Ct. 234, 236 (1975). Plaintiff fails, however, to prove that the quality, character and degree remain unchanged. As noted above, plaintiff failed to show any objective intent to use the entire property for gravel mining. The area devoted to the gravel pits at the adoption of the 1956 by-law was limited to the approximately five acres of cleared area in the southernmost portion of the property [See Exhibit no. 25]. Plaintiff's current day operation far exceeds the use as it existed in 1956.

Moreover, and probably most detrimental to plaintiff's cause, there has been no showing that the current use is not "different in kind in its effect on the neighborhood." *Chuckran*, supra, at 712. To the contrary, the Town has shown

that the surrounding property owners have borne the brunt of plaintiff's expanded operations, in the form of increased noise, increased particulate in the air, and possible structural consequences. For these reasons, this court concludes that plaintiff cannot meet its burden under the *Powers/Chuckran* test.

12. Plaintiff makes two arguments why, even though an impermissible expansion may have occurred, the Board's decision should be overturned. First, plaintiff argues that the building commissioner's letter of March 13, 1996, which states the opinion that the gravel pit was currently a legal non-conforming use, should be binding on the Town under some theory of equity or estoppel. It is true that when the Town needed gravel in 1996 for the Town Dump, the building commissioner was compliant. While the court does not wish to encourage such duplicity, whether intentional or negligible, the building commissioner's letter of opinion cannot act to bar the Town from now seeking to enforce the by-law.

Under Massachusetts law, the failure to implement a by-law works no estoppel. *Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157, 162 (1977); *Seekonk v. Anthony*, 339 Mass. 49, 55 (1959). If a use or structure "[is] a violation of a . . . zoning by-law, no permit [can] legalize it." *Id*, quoting *Inspector of Buildings of Burlington v. Murphy*, 320 Mass. 207, 210 (1947). The safety and welfare benefits conferred by zoning by-laws enure to the public, and "[that] right of the public to have the zoning by-law properly enforced cannot be forfeited by the action of its officers. *Cullen v. Building Inspector of N. Attleborough*, 353 Mass. 671, 675 (1968). Plaintiffs first argument must therefore fail.

Appendix B

13. Plaintiff's second argument is that if the zoning by-law excludes the expanded gravel pit operation, then the by-law effects a regulatory taking on the Property. However, adoption of zoning by-laws and enabling statutes which are not arbitrary and do not unduly restrict the use of private property is a permissible use of the police power and does not violate the takings clause of the Fifth Amendment of the United States Constitution or Article 60 of the Amendments to the Massachusetts Constitution. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Kilgour v. Grotto*, 224 Mass. 78 (1910). Zoning by-laws have historically been used to stabilize use of property and protect areas from deleterious uses. *Enos v. City of Brockton*, 354 Mass. 278, 280-81 (1968). Specific earth removal by-laws have been held to further the same purpose. *Glacier Sand & Stone Co. v. Board of Appeals of Westwood*, 362 Mass. 239, 242 (1972). Further, this court notes that plaintiff is left with many alternative uses for the property, in fact the property is historically multi-use. No taking by regulation has occurred in the present case. See *Daddario v. Cape Cod Commission*, 425 Mass. 411 (1997); also see generally *Town of Lexington*, supra, at 130.

14. Finally, the Board contends that by stretching the expansion of the pre-existing use beyond reason, plaintiff has lost not only the expansion, but the use itself. On this point the Town cites, *Ka-Hur Enterprises v. Zoning Bd. of Provincetown*, 424 Mass. 404 (1997). The Town's contention does not flow from the case cited. *KaHur* deals with the issue of abandonment and discontinuation of a non-conforming use. Abandonment is generally a question of fact. *Paul v. Selectmen of Scituate*, 301 Mass. 365, 370 (1938). Mere non-

use of property in of itself does not constitute an abandonment of use, and additional facts must be present before such a finding. *Derby*, supra, at 709. No abandonment has been shown in the present case. Gravel mining, albeit sporadic, has been continuous on the Property. By devoting other portions of the Property to different uses, the Giffords did not discontinue the gravel pit, they simply limited its range. *Ka-Hur Enterprises*, supra.

CONCLUSION

For the above reasons, plaintiff is left with the right to mine that portion of the site appropriated to gravel mining as of 1956. That area is best described as the southernmost five acres of the site shown as cleared land on Exhibit no. 25. To the extent this decree leaves plaintiff mining air, see *Wayland II*, such a result is a reflection of the realities of gravel mining, coupled with the passage of two score years, and does not indicate hollow justice.

Appendix B

ORDER

It is therefore **ORDERED** that Judgment enter **AFFIRMING** the decision of the Barnstable Zoning Board of Appeals sustaining the Cease and Desist Order of the building commissioner dated October 22, 1997, in all respects except as to the removal of gravel on that portion of the Property appropriated to that use in 1956.

s/ Gary A. Nickerson
Gary A. Nickerson
Justice of the Superior Court

DATED: June 25, 1999

APPENDIX C — ORDER OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DENYING FURTHER APPELLATE REVIEW DATED DECEMBER 21, 2005

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

No. FAR-15086

GIFFORD BROTHERS SAND AND GRAVEL, INC.,

vs.

ZONING BOARD OF APPEALS OF BARNSTABLE.

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 12/21/05, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: December 21, 2005

APPENDIX D — AFFIDAVIT OF FRANCIS RENNIE DATED SEPTEMBER 7, 2005

AFFIDAVIT OF FRANCIS RENNIE

I, Francis Rennie, to the best of my personal knowledge and belief, do hereby state the following:

1. I was born on June 21, 1914 and reside at 258 Popponesset Road, Cotuit, Massachusetts.

2. I have lived on Cape Cod for my entire life, except for 5 years - World War II.

3. From 1920 though 1924 I lived in Marstons Mills on Newtown Road about a mile from 810 Wakeby Road, the property of Charles Gifford, the former state representative who maintained a gravel pit at said premises.

4. I knew Charles Gifford and knew him to be a cranberry bog owner and builder. I have seen sand being delivered to many of the bogs in walking distance from Wakeby Road.

5. At that time and at those premises I can remember there were no residences on the property and that much of the loam and wood had been removed. Sand was being extracted at the time, There were also cars, trucks and equipment in various conditions on the premises.

Appendix D

6. I can clearly remember during my enrollment in grades One through Four (1920-1924) in the Marstons Mills Elementary School that I observed the Gifford property at Wakeby Road, Marstons Mills which area at that time was called Newtown/ Santuit.

7. When I first observed these premises they were clearly being utilized as a sand and gravel pit. I have lived in close proximity to these premises all of my life including up to the present day and said premises have always been used for extraction and processing of sand, gravel, loam, and compost, and also for storage, repair and operation of vehicles and equipment.

Sworn and subscribed under the pains and penalties of perjury

Dated: September 7, 2005

s/ Francis Rennie
Francis Rennie

APPENDIX E — AFFIDAVIT OF ROBERT H. ELLIS DATED DECEMBER 29, 2003

AFFIDAVIT OF ROBERT H. ELLIS

I, Robert H. Ellis, to the best of my personal knowledge and belief, do hereby state the following:

1. I was born on January 21, 1918, and reside at 2 Canary Street, Sandwich, Massachusetts.

2. I have lived on Cape Cod for my entire life.

3. In 1923 at the age of five I was present with my father Mark Ellis at 810 Wakeby Road, the property of Charles Gifford, the former state representative who maintained a gravel pit at said premises.

4. At that time and at those premises I can remember ongoing operations where loam, sand and gravel were being extracted. There were also vehicles and equipment in various conditions on the premises, but being young at the time, I did not understand their use.

5. I was driving at the age of five years old. I can remember that when I began attending school I myself would often drive our vehicle with my father being present.

6. My father would take me with him because he was suffering from a double hernia which would cause him considerable difficulty and render him unable

to drive for periods of time. I would take over the driving to assist him when necessary and this was often.

7. I can clearly remember being five years old and observing the Gifford property at Wakeby Road, Marstons Mills which area at that time was called Newtown/Santuit.

8. When I first observed these premises they were clearly being utilized as a sand and gravel pit. This was in the year 1923.

Sworn and subscribed under the pains and penalties of perjury

Dated: December 29, 2003

s/ Robert H. Ellis
Robert H. Ellis

OPPOSITION BRIEF

(3)

FILED
JUL 3 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1533

IN THE

Supreme Court of the United States

GIFFORD BROTHERS SAND AND GRAVEL, INC.,

Petitioner,

v.

ZONING BOARD OF APPEALS OF BARNSTABLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

RESPONDENT, TOWN OF BARNSTABLE'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT D. SMITH, Town Attorney,
Counsel of Record

T. DAVID HOUGHTON,
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

June 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. Is there a compelling issue presented that warrants this Court's further examination of a matter that should be decided on a state's principles of zoning law?

II. Where the Supreme Judicial Court of Massachusetts exercised its discretion to deny an application for Further Appellate Review filed two years and nine months late, should that exercise of discretion be reversed?

III. Where no motion for new trial has ever been presented to the Trial Court, should this relief now be granted by this Court?

IV. To the extent that enforcement of a valid residential zoning ordinance puts an end to an illegal commercial use of a property, does this amount to an inverse condemnation of the property?

[This page is intentionally left blank.]

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

JURISDICTION OF THE COURT 1

STATEMENT OF THE CASE 2

A. Substantive Background 2

B. Procedural Background 4

C. Factual Inaccuracies and Clarifications 7

REASONS TO DENY THE PETITION 9

I. The Decisions Of The Supreme Judicial Court And Appeals Court Of The Commonwealth Of Massachusetts Are Entitled To A High Degree Of Deference. 9

A. The granting of a FAR Application must be founded on upon substantial reasons affecting the public interest or the interests of justice. 10

B. Whether ruling on the merits or on the Petitioner's procedural lapses, the Supreme Judicial Court exercised its FAR discretion reasonably. 11

1. Substantively, the validity of a zoning enactment in Massachusetts that breaks an entire town into two zoning districts, business and residential, is well settled and in accord with the Appeals Court decision in this matter. 11

2. Procedurally, rejecting a FAR application presented two years and nine months late is certainly within the proper exercise of the Supreme Judicial Court's discretion. 12

3. Procedurally, a late motion for re-hearing with the State Appeals Court would justify both the Appeals Court denial of the motion and the refusal of the Supreme Judicial Court to further review the matter. 13

II. Petitioner's Demand Amounts To A Motion For A New Trial. It Is Seven Years Late And Unsupported. 14

A. There is no record to support the assertion that "new" evidence offered by affidavit could not have been discovered before trial. 15

B. Even if timely presented, the "new evidence" proffered in affidavits would not support a motion for new trial. 16

C. Incompetence of Trial Counsel: Even with no express time constraints to raise this matter, the trial judge has never been asked to do so. 17

III. Neither Enactment Nor Enforcement Of A Valid Zoning Ordinance Is A Taking. 18

A. Adopting town-wide zoning that prohibits certain activities is clearly a permissible undertaking. 18

B. Affirming the ban of commercial activities on locus is neither a taking nor an inverse condemnation. 18

C. The taking claim is not ripe because there has been neither pursuit nor denial of just compensation. 19

D. It is factually untrue that Petitioner has no other uses for its property. 19

E. Petitioner has not pursued or exhausted its range of remedies that would infuse value into its property. 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

Brown v. Penn. R.R., 282 F.2d 522 (3rd Cir. 1960), cert. denied 365 U.S. 818, 81 S. Ct. 690, 5 L.Ed.2d 696 (1961) 16

Cheang-Kee v. United States, 70 U.S. 320 (1865) 9

Daddario v. Cape Cod Commission, 425 Mass. 411 (1997) 18

Farmers Co-operative Elevator Association v. Strand, 382 F.2d 224 (8th Cir. 1978) 15

Flett v. W.A. Alexander & Co., 302 F. 2d 321(7th Cir.), *cert. denied* 371 U.S. 841, 83 S. Ct. 71, 9 L.Ed.2d 77 (1962) 15

Gage v. Egremont,
409 Mass 345, 566 N.E. 2d 1597 (1991) 11

Giordano v. McCartney,
385 F.2d 154 (3rd Cir. 1967) 16

MacDonald, Sommer & Frates v. County of Yolo,
477 U.S. 340 (1986) 20

Marietta Realty, Inc. v. Springfield Redevelopment
Authority, 902 F. Supp. 310
(D. Mass. 1995) 19

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 20

Penn Central Transportation Co. v.
New York City, 438 U.S. 104 (1978) 18

Village of Euclid, Ohio v. Amber Realty Co.,
272 U.S. 365 (1926) 18

Williamson County Regional Planning Commission
v. Hamilton Bank, 473 U.S. 172 (1985) 19

RULES:

Massachusetts Rules of Appellate Procedure

Rule 27.1 .....6, 7, 10, 12

Massachusetts Rules of Civil Procedure

Rule 60(b) 14, 17

Supreme Court Rule 15(2) 7

JURISDICTION OF THE COURT

The Petitioner's jurisdictional statement is incomplete in two vital respects and therefore potentially misleading.

Petitioner filed a single motion in the Commonwealth's Appeals Court to Extend Time to File a Petition for Rehearing and for Leave to File an Application for Further Appellate Review with the Commonwealth's Supreme Judicial Court (Appeals Court docket, Respondent's Appendix D, pp. 15a-20a)[1]. The Appeals Court did two things.

First, the Appeals Court extended the time to file for re-hearing, directing that Petitioner do so by December 19, 2002. Petitioner failed to comply with that order. However, a Petition for Re-hearing was filed on December 20, 2002, one day late. The Appeals Court then denied the Petition without comment.

Secondly, the state Appeals Court notified petitioner's current counsel that any petition for Further Appellate Review (FAR) would need to be filed directly with the Commonwealth's Supreme Judicial Court. On December 11, 2002, counsel announced in a letter to the Clerk of the Supreme Judicial Court that he intended to do so[2].

Nevertheless, nothing (no FAR Application, no motion to extend the time for filing a FAR, no motion for extraordinary relief given co-counsel's alleged incapacity, no motion to withdraw appearance, and

---

[1] For clarity, references to Appendix items in Respondent's Brief will be referred to as "R. App, etc". Reference to such items in Petitioner's Brief will be referred to as, simply, "App., etc.)

[2] In a letter dated December 11, 2002 directed to the Clerk of the Supreme Judicial Court (R. App. A, pp. 1a-2a), current counsel for the Petitioner stated in part, "I am writing to confirm the above because at this time it is my intent to file a Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review."

apparently no timely or effective follow-up with alleged successor counsel ... in short, nothing) was done, filed, requested, or advanced for two years and nine months after the required twenty-day deadline for filing a FAR petition.

Finally, on October 7, 2005, a Motion to File a FAR Application Late, accompanied by the FAR application itself, was docketed in the Supreme Judicial Court which denied the Application without comment on December 21, 2005 (R. App. E, pp. 21a-23a).

STATEMENT OF THE CASE

A. Substantive Background

This is a routine zoning case that focuses on Petitioner's mining of sand and gravel on a 16.6 acre parcel in a residential zone. Having received a cease and desist order from the Town, the petitioner appealed the order to the Town's Zoning Board of Appeals on the theory that the commercial use of the property was a protected, non-conforming use.

In 1929, Barnstable enacted its first zoning by-law that created two zones, business and residential. The business zone consisted of all properties that were then devoted to business use. The residential zone consisted of all remaining property in town (App. A: pp. 2a – 3a; App. B, pp. 11a-12a).

In 1956, Barnstable revised the zoning by-law, placing locus entirely in a residential zone, a classification that continues to date (App. A: pp. 2a; App. B: p. 12a).

The outcome of the action is dependant on the validity of the 1929 zoning enactment. If valid, all of Petitioner's commercial activities are illegal. On the other hand, if the 1929 by-law is invalid, the 1956 by-law controls; however, only that portion of Petitioner's

property devoted to mining activities in 1956 is protected as a non-conforming use.

The trial court found as fact that locus was virgin land until about 1947 when commercial activity began (App. B: p. 8a - #4). At that time, Petitioner's predecessor in title began to operate a sand and gravel pit, a contractor's storage yard, and a junkyard on portions of a 16.6 acre site (App. B: pp. 8a-10a). At trial, Petitioner presented little or no evidence concerning pre-1929 use[3] and the trial court made no findings as to pre-1929 use (App. B: pp. 7a-14a).

The trial court found that until about 1996, the mining operation occupied, at most, about five acres of the property (App. B: p. 21a). In 1996, Petitioner greatly expanded mining operations (App. B: p. 10a).

Having ruled that the 1956 by-law was controlling, the trial judge next addressed the physical extent and character of the non-conforming mining use. As a matter of law, he therefore limited mining to the five acre site in use before the 1956 by-law enactment. He did so even as he acknowledged that the five acres had been effectively stripped of all of its resources and that Petitioner would thus be left with the ephemeral right to mine only "air" (App. B: p. 24a).

In related rulings, the trial court rejected Petitioner's argument that the property owner's intent to mine the whole property should control to allow expansion of the protected non-conforming use. To the contrary, the trial court found as fact that not only had no such intent been proven, but that a clear contrary intent had been shown (App. B: pp. 9a, 17a).

---

[3] This was apparently a tactical decision made by trial counsel, given the trial judge's focus in a pre-trial conference on the 1956 by-law. See a discussion of the issue at paragraphs 21-22 in Petitioner's Motion to Enlarge Time (R. App. B, pp. 3a-9a) filed with the Supreme Judicial Court in October 2005.

Petitioner's intent argument was therefore rejected (App. B: pp. 21a-22a).

Petitioner alternatively argued at trial that the mining should be allowed on all of locus on a so-called "diminishing assets" theory of law adopted in some jurisdictions but previously rejected in Massachusetts (App. B: pp. 20a-21a). Because of the violence that this theory of law would wreak on the residential zoning scheme in general and the immediate residential neighbors in particular, the trial court declined to adopt Petitioner's "diminishing assets" argument to justify expansion of the supposed legal non-conforming mining use (App. B: pp. 18a-21a).

The Commonwealth's Appeals Court overruled the trial court and found that the 1929 enactment was a validly adopted and enforceable by-law (App. A: p. 5a). Absent appropriate variances or other zoning relief, the Appeals Court ruled that all mining operations and other commercial activity begun on this virgin parcel in 1947 were illegal (App. A: p. 5a). Lacking any such exception, mining sand and gravel from locus was at all relevant times an illegal commercial enterprise. Having so ruled, the Appeals Court found it unnecessary to address Petitioner's remaining arguments.

Neither outcome is acceptable to Petitioner as his mining activities by operation of law or fact have come to an end.

B. Procedural Background

Both the denial of Petitioner's motion for re-hearing in the Appeals Court and the Supreme Judicial Court's denial of the motion for Further Appellate Review were summary in nature and unexplained. Because the outcome at the State level could well have been based on Petitioner's procedural failings, a

statement of this case would be incomplete without a brief recitation of critical procedural history at the state level.

The genesis of this matter stems from a cease and desist order issued by Barnstable's zoning enforcement officer on October 22, 1997. Barnstable's Zoning Board of Appeals denied the Petitioner's appeal after hearing in a decision dated January 27, 1998. Petitioner's complaint was timely filed with the trial court in February of 1998, followed by a pre-trial conference and filing of memoranda in December 1998 (R. App. C, pp. 10a-14a). A jury-waived trial lasting approximately three days commenced in April 1999 followed by the trial court's findings and rulings in June 1999. After a motion to alter the judgment was denied, cross appeals were filed, the record assembled, the case entered in the Appeals Court in April of 2000, Petitioner's brief filed in October 2000, and oral argument held in May of 2002.

It is important to note that throughout this entire five year period, Petitioner was represented very vigorously by Attorney Gregory M. Downs who briefed and tried this matter in the lower court. Subsequently, Attorney James W. Stathopolous, Petitioner's counsel in the instant proceedings, filed his appearance as co-counsel in the state Appeals Court matter; both Messrs. Downs and Stathopolous appeared for oral argument before the Appeals Court while the latter actually argued the matter to the panel.

In its Appeals Court brief, the Petitioner identified three issues for the Court's consideration. First, it asked, "Whether the trial court erred in limiting the area of continued operation of the sand a gravel pit based on the uncontroverted testimony showing a clear intent of the property owner to use the entire parcel at the time the applicable zoning went into effect?" Secondly, it asked, "Whether the diminishing assets theory of the majority of jurisdictions should be

adopted by the Commonwealth when dealing with 'an assets extraction prior non-conforming use'"? Thirdly, Petitioner argued that trial court's findings and rulings with respect to the 1929 by-law should be upheld. Those are the only issues argued and briefed for the Appeals Court and it was upon those arguments that the Appeals Court expressly ruled.

The decision of the Commonwealth's Appeals Court was rendered on October 28, 2002. Petitioner then filed a motion in the Appeals Court to extend the time to file a motion for rehearing before the Appeals Court and for leave to file an application for Further Appellate Review (FAR) with the state's highest court, the Supreme Judicial Court. The Appeals Court allowed the motion to file for rehearing late and directed counsel to file the motion for rehearing by December 19, 2002.

In the same order, Petitioner was directed to file its intended Application for Further Appellate Review (FAR) directly with the Supreme Judicial Court (R. App. D, p. 19a, notation #16).

However, contrary to the Court's order, the motion for rehearing was not filed until December 20, 2002, one day after the deadline. Without hearing and without further explaining its reasoning, the Appeals Court denied the motion for re-hearing.

Thereafter, no pleadings of any sort were filed with any court until October 7, 2005 when a motion to file FAR application late and the FAR application itself were filed with the Commonwealth's Supreme Judicial Court (R. App. E, p. 21a).

It is particularly noteworthy that two years, nine months, and twenty-eight days had elapsed from the Appeals Court's denial of Petitioner's motion for rehearing until the FAR filing. It is equally noteworthy that Rule 27.1 (a) of the Massachusetts Rules of Appellate Procedure requires that a FAR application

be filed within twenty (20) days of the rescript of the Appeals Court[4]. Thus, on December 21, 2005, the Supreme Judicial Court denied the FAR application without comment.

C. Factual Inaccuracies and Clarifications

Pursuant to the requirements of Sup. Ct. R. 15 (2), the Respondent Town wishes to correct a number of factual misstatements in Petitioner's brief, as follows:

1. The evidence at trial supports the conclusion that commercial mining began on site not earlier than 1947, not eighty-five years ago (Petitioner's Brief, p. 2) or "around the turn of the century (1900)" as alleged (App. B: p. 10a).

2. As part of the Town's landfill capping procedure, the Town contracted with an independent contractor to supply materials and did not, as alleged, contract with the Petitioner for this purpose. That contractor purchased at least some of the sand and gravel for the project from the Petitioner (App. B: p. 10a).

3. Contrary to Petitioner's brief, the trial court did not find the 1929 zoning by-law unconstitutional. Rather, he found

---

[4] Rule 27.1 (a) of the Massachusetts Rules of Appellate Procedure states in part: "Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice ..."

that it "runs afoul of the zoning enabling act of the era."(App. B: p. 15a).

4. Petitioner alleges, in essence, the mental incompetence of trial counsel (Attorney Downes). Respondent points out that trial counsel engaged in a three-day trial and competently brought forth many issues for the court's consideration. Trial counsel then prepared an extensive brief for the Commonwealth's Appeals Court and joined present counsel in argument there. In the meantime, present counsel entered a general appearance before the Appeals Court and never raised the issue of trial counsel's alleged incompetence by way of appropriate motions until submitting a written request for a re-hearing submitted to a single justice of the Appeals Court.

5. Petitioner alleges that two disinterested witnesses whose affidavits are before this Court document pre-1929 commercial activity on site and the brief suggests that one of the individuals at one time occupied an official position apparently with the Respondent Town (Petitioner's Brief, p. 4). In fact, an examination of Petitioner's affidavits reveals no support for this latter representation. Additionally, the affidavits are very general and provide no illumination as the location or extent of any mining operations supposedly observed by these alleged witnesses. Additionally, there is no showing or allegation that these individuals were unavailable, unknown, and/or not susceptible of identification before trial.

6. Petitioner alleges that all commercial uses on the property are precluded by the Appeals Court decision and the decision amounts to an inverse condemnation. The bald statement is unsupported by any expert engineering or appraisal data. There is no evidence offered as to suitability of the property for the permitted uses that include the single-family residential use.

REASONS TO DENY THE PETITION

There is no federal question whatsoever presented nor has Petitioner shown any compelling reason to grant the Petition.

I. The Decisions Of The Supreme Judicial Court And Appeals Court Of The Commonwealth Of Massachusetts Are Entitled To A High Degree Of Deference.

The narrow question before this Court is whether the Supreme Judicial Court of Massachusetts appropriately exercised its discretion in denying an Application for Further Appellate Review (FAR) filed almost three years after the decision of the Commonwealth's Appeals Court. This Court has long and consistently ruled that it will not upset a lower court decision if it was properly within the reasonable exercise of the lower court's discretion. See *Cheang-Kee v. United States*, 70 U.S. 320 (1865) where the Court noted at page 326 that "... matters wholly within the discretion of the Circuit Court ... are not reviewable here."

A. The granting of a FAR Application must be founded upon substantial reasons affecting the public interest or the interests of justice.

The decision to grant a FAR application is a discretionary function of Court[5].

Rule 27.1 of the Massachusetts Rules of Appellate Procedure makes it clear beyond debate that, in order for a FAR application to be granted, the questions presented must conjure judicial visions of matters that are truly consequential for the public interest or are vital to the interests of justice. The Supreme Judicial Court is in the best position to determine whether this test has been met and the denial of the application without comment speaks loudly to the Court's negative conclusion.

---

[5] As the 1973 Reporter's Notes to Massachusetts Rules of Appellate Procedure Rule 27.1 observe, "Further review is analogous to the granting of certiorari by the Supreme Court of the United States." Granting of an application for further appellate review requires a vote of three justices of the Supreme Judicial Court (Mass. R. App. P. 27.1(e)).

B. Whether ruling on the merits or on the Petitioner's procedural lapses, the Supreme Judicial Court exercised its FAR discretion reasonably.

1. Substantively, the validity of a zoning enactment in Massachusetts that breaks an entire town into two zoning districts, business and residential, is well settled and in accord with the Appeals Court decision in this matter.

This is nothing more than a garden-variety zoning case. The Town's 1929 by-law classified the entire town into either a business or a residential district. Then-existing business property was zoned business. The balance of the Town was zoned residential.

In ruling that the 1929 enactment was legal and in rejecting Petitioner's claim of spot-zoning, the State Appeals Court followed a well-established line of precedent in the Commonwealth. See *Gage v. Egremont*, 409 Mass 345, 566 N.E. 2d 1597 (1991) where a zoning by-law remarkably similar to Barnstable's 1929 by-law was upheld by the Supreme Judicial Court. In rejecting further review of the Appeals Court decision on the merits of this action, the Supreme Judicial Court was not venturing into uncharted waters and was well within precedent to do so.

Petitioner's attack on the town's 1929 zoning enactment is further hobbled because it presented no credible evidence to the Trial Court regarding its pre-1929 commercial activities, either because it had none or because it chose to focus on the 1956 zoning amendment and subsequent on-site activity. See Petitioner's comment on its choice of tactics as

contained in its brief in support of its application for FAR, attached and discussed in footnote 2, above.

This tactical trial decision was made at Petitioner's peril and compelled the trial court to rule that this virgin land was partially converted to commercial activities not earlier than 1947. This finding of fact is absolutely fatal to Petitioner's claim that it can mine its entire property, not just the five acre site.

There was nothing presented to the Supreme Judicial Court on the merits that would require a finding that matters presented were vital to the public interest or that would affect the interests of justice. Given the high bar set for the granting of a FAR application, the Supreme Judicial Court was not only well within the limits of its discretion in rejecting the application, but was virtually required to do so.

2. Procedurally, rejecting a FAR application presented two years and nine months late is certainly within the proper exercise of the Supreme Judicial Court's discretion.

Procedurally, either a late FAR application to the Supreme Judicial Court or a late motion for re-hearing presented to the Appeals Court would be fatal to Petitioner's claim.

Here, the more deadly lapse involves Rule 27.1 of the Massachusetts Rules of Appellate Procedure. It requires that an application for FAR be filed with the Supreme Judicial Court within twenty (20) days of a decision of the lower Court. See footnote 3, above. This FAR petition was filed, not twenty *days*, but *two years and nine months* after the decision on the merits of the case by the Appeals Court.

While Petitioner argued before the Supreme Judicial Court in its FAR Application that successor counsel (an Attorney Joseph Runci) did nothing (including filing an appearance as successor counsel) before Runci's untimely death, and now continues to argue that his co-counsel (Attorney Downes) did nothing because of incapacity, Petitioner ignores the fact that its current counsel remained counsel of record before the Appeals Court, that current counsel had announced his intention to file a FAR application well before the Appeals Court had finally ruled on the case, and that current counsel filed nothing to elicit support from the Supreme Judicial Court to extend the FAR filing deadline for thirty-three months.

If there was ever a textbook example of a self-inflicted procedural wound that is, will always be, and should be fatal, this case is a prime example of it. On this reason alone, Massachusetts' highest court was well within the limits of its discretion in denying the FAR application.

3. Procedurally, a late motion for re-hearing with the State Appeals Court would justify both the Appeals Court denial of the motion and the refusal of the Supreme Judicial Court to further review the matter.

If the focus of review is on the Supreme Judicial Court's affirmation of the Appeals Court denial of Petitioner's Motion for Re-hearing, the result is and should be the same.

In the Appeals Court action, Petitioner's current counsel filed a request to a justice of the state Appeals Court to extend the time for filing a petition for re-hearing. This request was allowed and gave the

Petitioner more than three weeks to file its motion with a date-certain for filing specified in the order.

As the Appeals Court docket makes so painfully clear, Petitioner then missed the filing deadline by one day. Without moving the Court to further extend the deadline and without explanation for the delay, Petitioner nevertheless filed its Motion for Re-hearing. To no one's surprise, save only that of the Petitioner, the motion for re-hearing was denied without explanation or comment.

Once again, in tacitly accepting the Appeals Court ruling, Massachusetts' highest court would be and was well within the limits of its discretion in denying the FAR application.

Based on either the substantive or procedural conclusions that Respondent respectfully argues should be drawn at this point, this Court's inquiry ought not to proceed further. The Petition for Writ of Certiorari is without merit and should be denied without further inquiry.

However, because Petitioner raises other ancillary issues in its brief, Respondent will offer the following observations.

II. Petitioner's Demand Amounts To A Motion For A New Trial. It Is Seven Years Late And Unsupported.

Rule 60(b) of the Massachusetts Rules of Civil Procedure discusses the granting of new trial.[6] A

---

[6] In relevant part, Rule 60(b) notes, "On motion and upon such terms as are just, the court may relieve a party or his representative from a final judgment ... for the following reasons: (1) mistake, inadvertence, surprise, or ***excusable neglect***; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); ... (6) ***any other reason justifying relief from the operation of***

motion for relief from judgment or order is addressed to the trial judge's discretion and is generally not reviewable except for a clear abuse of discretion. See Reporter's Notes – 1973, citing *Farmers Co-operative Elevator Association v. Strand*, 382 F.2d 224 (8th Cir. 1978).

Thus, a motion to set aside the judgment for "excusable neglect" or for "newly discovered evidence" should have been presented to the trial judge within one year of entry of judgment. Petitioner offers no explanation as to why such a motion could not have been filed with the trial judge in this time frame. To ask for a new trial now is untimely and not presented to the appropriate court.

A. There is no record to support the assertion that "new" evidence offered by affidavit could not have been discovered before trial.

As the Reporter notes, "The movant bears the burden of showing that the evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(b)" quoting *Flett v. W.A. Alexander & Co.*, 302 F. 2d 321, 324 (7th Cir.), *cert. denied* 371 U.S. 841, 83 S. Ct. 71, 9 L.Ed.2d 77 (1962):

> "Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances."

As the affidavits presented in the record demonstrate, both affiants are life-long residents of Cape Cod and presumably were available to trial

---

the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment ... was entered..." (Emphasis provided.)

counsel before and during the trial of this action. Certainly, there has been no demonstration in the record that Petitioner was excusably ignorant of the existence of this evidence. *Brown v. Penn. R.R.*, 282 F.2d 522 (3rd Cir. 1960), *cert. denied* 365 U.S. 818, 81 S. Ct. 690, 5 L.Ed.2d 696 (1961).

B. Even if timely presented, the "new evidence" proffered in affidavits would not support a motion for new trial.

In requesting a new trial, the Reporter notes that Petitioner must show that "the evidence must be of a material nature and so controlling as probably to induce a different result", citing *Giordano v. McCartney*, 385 F.2d 154 (3rd Cir. 1967).

Here, the trial court found that site-specific testimony showed that the property was virgin land in 1947. And an aerial photograph from 1956[7] is in stark contrast to the vague recollections and generalizations of affiants who are now aged 87 and 91 whose recollections were formed between ages 6 to 10 (App. D, Rennie affidavit) and at age 5 (App. E, Ellis affidavit). And neither affidavit expressly ties the observations to a specific parcel of land, or any specific portion thereof.

Additionally, it can hardly be said that the affidavits would outweigh the photographic evidence before the trial court, evidence that directly contradicts the substance and implications of these affidavits. The *Giordano* standard has not been met and these affidavits are insufficient to support a motion for new trial.

---

[7] The trial court refers to this photo as a 1964 photo (Trial Exhibit 25) although it was actually taken in 1956. See Appendix B, Page 8a, Finding number 6. The Town's motion to correct the record was not acted upon.

C. Incompetence of Trial Counsel: Even with no express time constraints to raise this matter, the trial judge has never been asked to do so.

While motions for new trial based on newly discovered evidence or excusable neglect face a one year time restriction, a Rule 60(b)(6) motion asking for a new trial for "***Any other reason justifying relief from the operation of the judgment***" has no such time limit. It must be presented simply within a **"reasonable time"**.

Relief from judgment based on trial counsel's alleged disability would certainly be cognizable and no doubt reviewed by the trial judge with concern, if not sympathy, under Mass. R. Civ. P. Rule 60(b)(6).

Inexplicably, Petitioner has never broached the subject of trial counsel's alleged incapacity with the trial judge, choosing instead to ask appellate courts for that relief. Obviously, the trial judge would have been in the best position to have observed trial counsel's demeanor and competence. Nevertheless in spite of, or perhaps precisely because of, the trial judge's vantage point, Petitioner has avoided asking for Rule 60(b)(6) relief altogether.

Nor has Petitioner presented any expert medical evidence by affidavit or otherwise that supports the allegation that counsel was medically disabled prior to or during trial.

Finally, it should be observed that if trial counsel was not disabled until some time post-trial, subsequent disability while regrettable would not *per se* be a basis for reopening the trial.

On the state of the record, one can only guess at the state of trial counsel's health at any point in time. When being asked to overturn the decisions of both a trial court and an appeals court for such an

extraordinary reason, both this Court and the Supreme Judicial Court are entitled to a far more robust record on the subject than presented here.

III. Neither Enactment Nor Enforcement Of A Valid Zoning Ordinance Is A Taking.

A. Adopting town-wide zoning that prohibits certain activities is clearly a permissible undertaking.

By their very nature, zoning enactments allow some activities and deny, restrict, or condition other activities. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The fact that certain uses within a given zone may be eliminated or constricted does not give rise to a claim for condemnation as long as there are some activities and associated inherent value to which the property can still be put. See *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926); *Daddario v. Cape Cod Commission*, 425 Mass. 411 (1997).

B. Affirming the ban of commercial activities on locus is neither a taking nor an inverse condemnation.

Here, Petitioner apparently claims (Petitioner's Brief, p. 7) that the decisions of the Massachusetts Courts, when applied to Petitioner's property, work to effectively produce an inverse condemnation. At least as described in Petitioner's brief, it is not an action of the municipal Respondent that is objected to, but rather the *effect* that the judicial process will have on Petitioner's land that is problematic.

The axiom, "no action, no taking", applies. The fact that Petitioner's illegal use of the property is declared

illegal, combined with the fact that Petitioner has supposedly destroyed its property such that only illegal use of locus will render value to Petitioner, is neither the Town's responsibility nor a compensable event.

C. The taking claim is not ripe because there has been neither pursuit nor denial of just compensation.

In an action where inverse condemnation is claimed, it is incumbent upon the property owner to pursue available remedies for just compensation. Otherwise, a constitutional claim will be deemed premature. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

Massachusetts has such a process and that process has been found to be adequate. *Marietta Realty, Inc. v. Springfield Redevelopment Authority*, 902 F. Supp. 310 (D. Mass. 1995).

Having failed to pursue compensation, Petitioner's constitutional claims should not lie.

D. It is factually untrue that Petitioner has no other uses for its property.

Petitioner' brief asserts (Brief, p. 7) that it has no practical ability to use its property unless allowed to mine it in violation of applicable zoning. That assertion is simply inaccurate.

As a matter of right, current zoning allows Petitioner to use the property as a single lot for single family housing. Even with some costs for restoration and landscaping (made necessary only because of Petitioner's rapacious use of the land), a sixteen acre, single family lot on Cape Cod today is worth a small

fortune. There has been no demonstration by Petitioner at any level of the proceedings to support the bald claim that restricting use of the property to residential renders it worthless.

Additionally, existing permits allow some commercial use of locus. The fact that the permits have a limited life does not mean that they cannot be fully enjoyed at the present time.

E. Petitioner has not pursued or exhausted its range of remedies that would infuse value into its property.

Petitioner has never attempted to explore alternative administrative or legislative relief with the Respondent Town. With more than sixteen acres available to be subdivided and sold off, there has been no effort to do so. The inherent value of real property on Cape Cod in general, and perhaps to abutters in particular, remains unexplored.

As mentioned previously, the property enjoys the benefit of permits that allow some commercial activity at locus. No attempt to extend or modify these permits for other uses has been explored. Other development options that need not be explored here are also potentially available. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); see also *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) where the Court noted the need to exhaust administrative remedies to determine whether a regulation amounted to a taking, and said, "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

Petitioner's lack of initiative and imagination do not equate to a denial of any practical use of the property.

CONCLUSION

The Petitioner has achieved the dubious accomplishment of having so badly and illegally managed its land that Petitioner now asserts the property is no longer suitable for its one legal use, single-family residences. If that were not enough, Petitioner now seeks to have the Town compensate it for its own mis-management. One is reminded of the old saw about the child who, having dispatched his parents, now claims the court's mercy because he has recently been orphaned.

There is simply no Federal issue presented that has not been thoroughly resolved for years nor are there any other compelling reasons to grant this Petition. There comes a time when a case needs to be finally resolved; in this action, that time is long past. Therefore, the Respondent respectfully requests that this Petition be denied.

Respectfully submitted,

ROBERT D. SMITH, Town Attorney,
Counsel of Record

T. DAVID HOUGHTON,
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

June 2006

APPENDIX TABLE OF CONTENTS

APPENDIX A

Letter to Supreme Judicial Court from Attorney James W. Stathopoulos, dated December 11, 2002 ..... 1a

APPENDIX B

Appellant's Motion to Enlarge Time filed with the Appeals Court, dated October 7, 2005 ..... 3a

APPENDIX C

Barnstable Superior Court Docket Entries 10a

APPENDIX D

Appeals Court Docket Entries 15a

APPENDIX E

Supreme Judicial Court Docket Entries 21a

APPENDIX A

Law Offices of
James W. Stathopoulos

All Correspondence to:

METRO NORTH
MAPLE STREET-ROUTES 128 @ 93
STONEHAM, MASSACHUSETTS 02180
TEL (781) 438-3661 FAX (781) 438-3205

METRO BOSTON
40 BROAD STREET, SUITE 805
BOSTON, MASSACHUSETTS 02109
TEL (617) 423-0001 FAX (617) 423-0009

METRO SOUTH-CAPE COD
MERCHANT SQUARE
SANDWICH, MASSACHUSETTS 02563
TEL (508) 888-0404 FAX (508) 833-0303

RECEIVED
DEC 26 2002
TOWN ATTORNEY
TOWN OF BARNSTABLE

December 11, 2002

Susan Mellen, Clerk
Supreme Judicial Court
1300 New Court House
Pemberton Square
Boston, MA 02108

RE: Gifford Brothers Sand and Gravel, Inc. v. Zoning Board of Appeals of Barnstable No. 2000-P-0701

Dear Ms. Mellen:

I received the Appeals Court decision in the above referenced matter on Tuesday, November 19, 2002 at my Boston office on Broad Street, the same address that I provided to the Appeals Court on the intake/appearance form provided to me on the day of argument. The decision had multiple postmarks and had been addressed to a Hyannis office that I had used thirteen years ago.

The Appeals Court (see attached Notice of Docket Entry) has allowed my Motion to Enlarge Time (also attached).

I am writing to confirm the above because at this time it is my intent to file a Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review. In order to properly comply with the requirements of said rules, I will require additional time in which to file the complete application for FAR. Having just received a copy of the transcript and briefs in this matter and with the upcoming holiday season and four school age children, I cannot see how I could possibly file the application prior to January 15, 2003 and intend to file same along with a Motion to Enlarge Time therefore, on said date.

I appreciate your assistance herein.

Sincerely,

James W. Stathopoulos

JWS/jw
CC: Ruth J. Weil, Esquire, Gregory M. Downs, Esquire

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

APPEALS COURT DOCKET #2000-P-0701
(SUPERIOR COURT DOCKET #98-87)

* *

GIFFORD BROTHERS *
SAND & GRAVEL, INC., *
APPELLANT *
*
V. *
*
TOWN OF BARNSTABLE *
ZONING BOARD OF APPEALS, *
APPELLEE *

* *

APPELLANT'S MOTION TO ENLARGE TIME

Now comes GIFFORD BROTHERS SAND & GRAVEL, INC., Appellant herein, and moves that this Court allow Appellant to enlarge the time for filing a MRAP Rule 27.1 Application for Further Appellate Review. As grounds herefor the Appellant states as follows:

1. Appellant's original Counsel Gregory Downs, Esquire, the attorney who actually tried the case in the Barnstable Superior Court, filed an appeal of the Superior Court Justice's decision which permitted Appellant to use only a portion of his property for commercial purposes.

2. Mr. Downs appealed that decision seeking a ruling that the entire property be commercially utilizable.

3. At the time of the trial and clearly by the time of the appeal to the Appeals Court Mr. Downs had been and is still suffering from a debilitating illness and is no longer able to practice law.

4. Christopher Keyes, President of Appellant Gifford Brothers prevailed upon Attorney James Stathopoulos, to assist Appellant and Mr. Downs by filing a Petition for Rehearing with the Appeals Court. Mr. Stathopoulos did so but without the benefit of Mr. Downs' files or assistance both of which were unavailable at the time, and the petition was denied.

5. Mr. Stathopoulos, upon the receipt of the notice of denial of the Petition for Rehearing attempted to file a request to enlarge time for the filing of an Application for Further Appellate Review but was informed by the Clerk's Office that such motions are not accepted except when simultaneously accompanied by the actual Application FAR itself.

6. Mr. Stathopoulos informed Appellant of the above and Appellant then retained successor counsel, Joseph Runci, Esquire for the purpose of filing the Application for FAR.

7. Attorney Runci informed Appellant that Runci had requested case files from Attorney Downs.

8. Mr. Downs, suffering from mental difficulties, initially provided nothing, procrastinated for months and avoided communication.

9. Benjamin Losordo, Esquire (Attorney Downs' former partner) though himself plagued by serious health problems (requiring multiple oncology-related hospitalizations and who is at this time in-patient at Brigham & Womens Hospital) was at that time still able to assist Mr. Downs in the process of locating Appellant's files in this matter.

10. Attorney Losordo, who has filed an affidavit in support of this motion attached hereto as Exhibit A, went to Mr. Downs' home on several occasions and eventually compiled a box containing what is believed to be the bulk of Appellant's files.

11. Mr. Lorsordo turned over possession of the said files to Appellant's successor Counsel, Joseph Runci, Esquire.

12. Appellant was under the assumption that Attorney Runci had filed an Application for FAR. Awaiting a decision, the Appellant has continued to operate his facility at the locus under the terms of the trial Judge's order and has done so with the full knowledge of the Appellee.

13. What work Attorney Runci (who at the time was leasing space in an office suite owned by Attorney Shaun M. Ellis in Sandwich, MA) actually performed, if any, is unknown.

14. On September 29, 2003, Attorney Ellis' wife and an employee both discovered Attorney Runci deceased, and locked in his office. As a result Ellis' office operated on a limited basis for several months until the attorneys and other staff were able to recover from the shock of what had occurred.

15. In July of this year after returning from a week's vacation Attorney Ellis discovered that his office condominium had been flooded. As a result of the cleanup that ensued Mr. Ellis discovered a box of files in the storage area of the cellar of his office that appeared to have been the box that was provided by Attorney Losordo to Attorney Runci. Mr. Ellis saw that Appellant's name was on some of the documents and contacted Appellant. Attached hereto as Exhibit B is Mr. Ellis' Affidavit.

16. Appellant directed Mr. Ellis to contact Attorney Stathopoulos and turn over the documents to Stathopoulos. The documents had an extremely high degree of water content and the vast majority were stuck together and very difficult to decipher.

17. Attorney Stathopoulos reviewed the contents of the box provided to him and came to the conclusion that the documents contained therein comprised the files that Mr. Downs had used at the time of the trial of this matter. There were no appellate documents of any kind.

18. Attorney Stathopoulos informed Appellant of these facts and Appellant requested that Attorney Stathopoulos file this Motion to Enlarge Time and the accompanying Application FAR.

19. The gravamen of the case is whether ongoing commercial operations at the locus owned by Appellant pre-existed Appellee's 1929 zoning ordinance.

20. The trial judge, a long-time attorney and resident of Cape Cod and a person himself familiar with the area of the locus found that there was a valid existing commercial use.

21. Attorney Downs had informed Appellant that the trial judge had suggested pre-trial that the Judge was not as concerned with the commercial status of the property circa 1929 but was more focused on the question of the type of commercial activity circa 1956, (a time when Appellee had enacted an even more comprehensive zoning ordinance/map) so that the Judge could make a determination regarding what portion of the locus on which he would allow certain uses.

22. Both trial attorneys and the Court therefore focused on the nature of the operations in place circa 1956 and not much evidence, for or against, was adduced by either party as to the status quo circa 1929. Moreover the trial Judge found the 1929 ordinance to be constitutionally defective.

23. The Appeals Court however, eventually determined the 1929 ordinance to be valid.

24. Appellant has researched and investigated the availability of living witnesses to corroborate the commercial operations ongoing at the locus (which was at one point comprised of land in both Barnstable and Sandwich) prior to the 1929 act.

25. Appellant has located Robert Ellis, a resident of Sandwich and a former Chairman of the Board of Health for that town (having been a member of the Board for over thirty years), who clearly remembered substantial

commercial operations at the locus, from 1924 to the present time. Robert Ellis' affidavit is attached to the Appellant's Application for FAR filed herewith.

26. Appellant also located Francis Rennie, a resident of the Town of Barnstable, who remembered substantial commercial operations at the locus since 1920 and who also knew the owner of the locus at the time of the Appellee's 1929 zoning enactment. Francis Rennie's affidavit is attached to the Appellant's Application FAR filed herewith.

27. It now appears that there are additional octogenarians who are of sound mind and good memory that will be able to corroborate the testimony of Mr. Rennie and Mr. Ellis. Current counsel is working diligently to compile a list of additional affiants who can testify to ongoing commercial operations at the locus pre-1929 to present.

28. The trial Judge found the commercial operations at the locus to be continuous and ongoing for his purposes.

29. There appears to be absolutely no doubt that the subject locus had ongoing and valid commercial uses pre-existing the Appellee's 1929 ordinance.

30. Were the Appellee to argue that this information is untimely the Appellant would suggest (a) the extreme incapacity and/or death of two of Appellant's prior attorneys should not be held against Appellant; (b) no party is prejudiced; (c) there are a significant number of living eye-witnesses that can corroborate the existence of pre-existing

commercial uses and (d) it would be unjust to deny the obvious truth of all of the above and allow clear error to become law.

31. It appears that justice would require the consideration of the Appellant's Application for Further Appellate Review coterminously filed herewith. The enlargement will allow the truth to come out and give Counsel the means to adequately and properly present the Appellant's issues to the Court.

Wherefore the Appellant request that this Court allow Appellant to enlarge the time for filing a MRAP Rule 27.1 Application for Further Appellate Review.

Respectfully submitted,

/s/ James W. Stathopoulos, Esquire
BBO#477480
Attorney for Appellant
43 Kingston Street
Boston, MA 02109
(617) 423-0001

Dated: October 7, 2005

APPENDIX C

GIFFORD BROTHERS SAND AND GRAVEL, INC.
vs.
ZONING BOARD OF APPEALS,
TOWN OF BARNSTABLE

Sandwich

$185 paid
$50 PI paid

Commonwealth of Massachusetts
Barnstable, SS
Superior Court for Civil Business

Counsel for Plaintiff

Gregory M. Downs
Losordo & Downs
P.O. Box 1637
78 Route 6A
Sandwich 02563
(508-888-6067)

Counsel for Defendant

Robert D. Smith
Ruth J. Weil
Town of Barnstable
367 Main Street, New Town Hall
Hyannis, MA 02601-3907
790-6280

ACTION AND DEMAND

Zoing Appeal/Declaratory Judgment

1998

Feb. 9, No. 1 – Complaint

Feb. 9, No. 2 – Plaintiff's statement pursuant to S.C. Rule 29

Feb. 20, No. 3 – Plaintiff's affidavit of notice pursuant to G.L. c. 40A, § 17

March 20, No. 4 – Appearance of Robert D. Smith and Ruth J. Weil for defendant

Oct. 15, No. 5 – Defendant's motion for preliminary injunction, memorandum in support, with affidavits in support

Oct. 15 – Order of notice issued returnable on October 22, 1998

Oct. 22, No. 6 – Defendant's affidavits (2) in support of #5

Oct. 22, No. 7 – Plaintiff's memorandum in opposition, with affidavits (2) in support of opposition of #5

Oct. 22 – Motion #5 allowed in accordance with paragraph one only to the description of property, by the Court, O'Neill, J.

Oct. 22, No. 8 – Interlocutory order on preliminary injunction, by the Court, (O'Neill, J.) (copy to attys.)

Dec. 16, No. 9 – Pre-trial conference scheduled for February 3, 1999, at 2:00 p.m., by the Court, Connon, J. (copies to atts.)

1999

Feb. 3, No. 10 – Pre-trial orde--joint pre-trial memo. filed; case assigned for trial on April 27, 1999, at 9:00 a.m.; by the Court, Connon, J. (copy to attys. 2/5/99)

March 31, No. 11 – Defendant's motion in limine with statement of reasons to exclude testimony of expert witnesses in support, plaintiff's opposition

April 27, No. 12 – Abutters motion to intervene as party defendants filed and denied, by the Court, Nickerson, J.

27, No. 13 – Trial without jury (Nickerson, J.)

27, No. 14 – Defendants' motion for view filed and allowed, by the Court, Nickerson, Jr.

25, No. 15 – Findings of fact, rulings of law, by the Court, Nickerson, J. (copies to attys.)

April 27, No. 16 – Defendants' request for findings of fact and rulings of law

July 21, No. 17 – Judgment on findings by the Court (copy to attys.)

26, No. 18 – Plaintiff's motion to reconsider, alter or amend judgment with opposition

August 2 – Motion #18 denied without prejudice, S. C. rule 26: Arthur D. Little Inc. v. East Cambridge Savings Bank 35 Mass. App. 734, 742; by the Court, Nickerson, J. (copy to attys. 8/5/99)

" 9, No. 19 – Plaintiff's motion to reconsider, alter or amend judgment with opposition and deft's memorandum in support of opposition

" 17 - Motion #19 denied, without prejudice, S. C. Rule 26: Arthur D. Little Inc. v. East Cambridge Savings

" 10, No. 20 – Plaintiff's notice of appeal (Mr. Justice Nickerson notified and copy to atty – 10/21/99)

"16, No. 21 – Defendant's notice of appeal (Mr. Justice Nickerson notified and copy to atty. 10/21/99)

November 15, No. 22 – Complaint for contempt, affidavit in support

November 17 – Summons to issue ordering plaintiff to appear for the purpose of holding a hearing on the merits of the contempt complaint, returnable at Barnstable, Wednesday, November 24, 1999, at 2:00 p.m., by the Court, Nickerson, Jr.

November 17 – Summons on complaint issued

December 12, No. 23 – Plaintiff's certificate re ordering transcript

December 19, No. 24 – Defendant's certificate re not ordering transcript

December 23, No. 25 – Civil contempt summons returned with service made on plaintiff and Christopher Keyes on Nov. 18, 1998

December 23, No. 26 – Answer to contempt complaint by Christopher Keyes, President of plaintiff corporation by Gregory M. Downs

December 23, No. 27 – Contempt hearing (Nickerson, J.)

Findings on contempt hearing on record

December 24, No. 28 – Judgment on contempt (copy to attys.)

2000

January 8 – No. 29 – Transcript of testimony (1 volume)

March 28, No. 30 – Transcript of testimony (2 volumes)

April 10 – Attorneys and Clerk of the Appeals Court notified record assembled in accordance with Appellate Rule 9.

A true copy, Attest:

/s/ Phyllis A. Day, Clerk

APPENDIX D

APPEALS COURT
Panel Cases
Case Docket

GIFFORD BROTHERS SAND & GRAVEL vs.
BARNSTABLE ZONING BD. OF APPEALS TOWN OF
2000-P-0701

CASE HEADER

Case Status	Closed: Rescript issued
Nature	Zoning appeal: c40A
Sub-Nature	declaratory judgment
Appellant	Both Plf & Deft
Brief Status	
Panel	Gelinas, Kantrowitz, Doerfer, JJ.
Citation	56 Mass. App. Ct. 1105
Lower Court	Barnstable Superior Court
Lower Ct Judge	Gary A. Nickerson, J.
Status Date	12/27/2005
Entry Date	04/20/2000
SJ Number	
Case Type	Civil
Brief Due	
Argued/Submitted	04/10/2002
Decision Date	10/28/2002
TC Number	98-87
TC Entry Date	02/09/1998

ADDITIONAL INFORMATION

FAR docket number is FAR-15086.

INVOLVED PARTY

Gifford Brothers Sand & Gravel
Plaintiff/Appellant
Blue brief & appendix filed
3 Extensions, 127 Days

ATTORNEY APPEARANCE

Gregory M. Downs, Esquire
James W. Stathopoulos, Esquire

INVOLVED PARTY

Barnstable Zoning Bd. of Appeals Town of
Defendant/Appellee
Red brief filed
1 Extension, 27 Days

ATTORNEY APPEARANCE

Ruth J. Weil, Esquire

DOCKET ENTRIES

06/01/2000 - **** Cross Appeal ****

10/04/2000 – Briefs located in Room 952: Cab 1; shelf 1.

04/20/2000, #1 – Entered.

05/30/2000, #2 – Motion to docket cross-appeal late, filed by Gifford Brothers Sand & Gravel.

05/30/2000, #3 – MOTION to extend brief & appendix due date, filed by Barnstable Zoning Bd. of Appeals Town of:

06/01/2000 – RE#2: The motion to docket the appeal late is allowed and the appeal of the plaintiff is entered this date. Pursuant to Mass.R.A.P. 16(i), the plaintiff

shall be deemed the appellant unless the parties otherwise agree. Appellant's brief & appendix are due 6/30/00. (Lenk, J.) Notice.

06/02/200 – RE:#3 See this court's action of 6/1/2000 on paper #2. *Notice.

06/05/2000, #4 – Response to #2, filed by Barnstable Zoning Bd. of Appeals.

06/08/2000 – RE#4: The within is treated as a motion for reconsideration and is denied. (Lenk, J.) *Notice.

06/21/2000, #5 – Joint motion to enlarge time for filing briefs.

06/21/2000 – RE#5 The appellant shall file the brief & appendix on or before 8/29/00. No further enlargements. The appellee's request for enlargement is denied without prejudice to refiling after the appellant files the brief & appendix. Notice.

09/08/2000, #6 – Letter from Atty Weil re: Status of case.

09/08/2000 – RE#6 The time period for appellee's due date does not begin to run until the appellant's brief & appendix are accepted & docketed. Notice.

09/21/2000 – Notice preceding dismissal: Rule 17A.

10/04/2000, #7 – MOTION to extend conforming brief & conforming appendix due date, filed by Gifford Brothers Sand & Gravel, Inc.

10/04/2000 – RE#7: Allowed to 10/04/2000. *Notice.

10/04/2000, #8 – SERVICE of brief & appendix for Plaintiff/Appellant Gifford Brothers Sand & Gravel (2 vols appx and 1 vol exhibits).

10/10/2000, #9 - RESPONSE to paper #7 filed by Zoning Board of Appeals, Town of Barnstable.

10/16/2000, #10 - MOTION to extend brief due date of Town of Barnstable Zoning Bd. of Appeals.

10/20/2000 - RE#10: Extension to 11/30/2000 granted for filing of brief of Barnstable Zoning Bd. of Appeals Town of, Defendant/Appellee. Notice to counsel.

10/20/2000 - RE#9 Treating the within as a motion to strike pages E5 and E6 of the appellants' Exhibit volume for the reason that the documents are not part of the record below and to correct the date on pages E23 and E24 from 1955 to 1968, it is referred to the panel assigned to decide the appeal. *Notice.

11/30/2000, #11 - SERVICE of brief for Defendant/Appellee Barnstable Zoning Bd. of Appeals Town of.

03/19/2002, #12 - Notice of 04/10/2002, 9:30 A.M. argument sent.

03/21/2002, #13 - Letter pursuant to MRAP 16(l) filed by Barnstable Zoning Bd. of Appeals.

04/10/2002 - Oral argument held. (GS KN DO).

10/28/2002 - RE#9 (Revised Action). Allowed. (Gelinas, Kantrowitz, Doerfer, JJ.) *Notice.

10/28/2002, #14 - Decision: Rule 1:28 (GS KN DO). The judgment of the Superior Court is modified by striking the clause in paragraph 1 that begins with "except" and ends with "1956." As so modified, the judgment is affirmed." *Notice. (See image on file.)

11/18/2002 - Mail to Atty Stathopoulos returned - resent to new address.

11/25/2002 - RESCRIPT to Trial Court.

11/26/2002, #15 - Letter from James W. Stathopoulos, Esquire re: received decision on 11/19/02; and require the benefit of the full 14 and 20 day periods to file Petition for Rehearing and Further Appellate Review.

11/27/2002 - RE#15 Either a M.R.A.P. 27 or 27.1 filing should be accompanied by a motion to enlarge setting out the within, note the rescript issued to the trial court on 11/25/02. *Notice.

12/09/2002, #16 - Motion to enlarge time for filing an MRAP Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review, filed by Gifford Brothers Sand & Gravel.

12/10/2002 - RE#16 Appellant may file his petition for rehearing on or before 12/19/02. Any request for an enlargement of time to file an application for F A R must be made to SJC. (Gelinas, Kantrowitz & Doerfer, JJ.) *Notice.

12/20/2002, #17 - PETITION for Rehearing, filed by Gifford Brothers Sand & Gravel.

01/09/2003, #18 - ORDER: Denial of petition for rehearing. (GS-KN-DO, JJ.) *Notice/Image.

10/27/2005 - Copy of FAR application of Gifford Brothers Sand & Gravel.

12/27/2005 - FAR DENIED (on 12/21/05).

03/20/2006, #19 – Letter from Supreme Court of the United States, Washington, D.C. re: extension of time to file a petition for a writ of certiorari to 05/20/06.

APPENDIX E

SUPREME JUDICIAL COURT
For the Commonwealth
Case Docket

GIFFORD BROTHERS SAND AND GRAVEL, INC. vs.
ZONING BOARD OF APPEALS OF BARNSTABLE
FAR-15086

CASE HEADER

Case Status	FAR denied
Nature	Zoning appeal: c40A
Appeals Ct Number	2000-P-0701
Appellant	Both Plf & Deft
Citation	45 Mass. 1109
Full Ct Number	
Lower Court	Barnstable Superior Court
Status Date	12/21/2005
Entry Date	10/07/2005
Opposition Date	
Applicant	Plaintiff
Case Type	Civil
TC Number	98-87
Lower Ct Judge	Gary A. Nickerson, J.

INVOLVED PARTY

Gifford Brothers Sand & Gravel
Plaintiff/Appellant

ATTORNEY APPEARANCE

James W. Stathopoulos, Esquire
Gregory M. Downs, Esquire

INVOLVED PARTY

Barnstable Zoning Bd. of Appeals
Defendant/Appellee

ATTORNEY APPEARANCE

T. David Houghton, Esquire
Robert D. Smith, Esquire
Ruth J. Weil, Esquire

DOCKET ENTRIES

10/07/2005 – Docket opened.

10/07/2005, #1 – MOTION to file FAR application late, filed for Gifford Brothers Sand & Gravel by James W. Stathopoulos, Esquire. (Referred to the justices) Notice sent.

10/07/2005, #2 – FAR APPLICATION of Gifford Brothers Sand & Gravel, filed by James W. Stathopoulos, Esquire.

10/24/2005, #3 – OPPOSITION to Paper #1 (Appellants' motion to file FAR application late), filed for Barnstable Zoning Bd. of Appeals Town of by T. David Houghton, Esquire, Robert D. Smith, Esquire, Ruth J. Weil, Esquire. (Referred to the justices) Notice sent.

10/27/2005, #4 – Additional copies of the appellant's FAR application received this date. Only one copy was filed on 10/7/05.

11/03/2005, #5 – Additional copies of Appellee's Opposition to Motion to Enlarge time.

11/30/2005, #6 – Action on application deferred. (RA and Briefs requested from Atty. Stathopoulos.)

(12/13/05: Materials received from Atty. Stathopoulos.) 12/28/05: Materials returned to Atty. Stathopoulos.)

12/21/2005, #7 – DENIAL of FAR application.

No. 05-1533

IN THE

Supreme Court of the United States

GIFFORD BROTHERS SAND AND GRAVEL, INC.,

Petitioner,

v.

ZONING BOARD OF APPEALS OF BARNSTABLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

RESPONDENT, TOWN OF BARNSTABLE'S SUPPLEMENTAL RESPONSE

ROBERT D. SMITH, Town Attorney
Counsel of Record

T. DAVID HOUGHTON
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

July 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

INTRODUCTION

The gravamen of Petitioner's case is that the Town's 1929 by-law is illegal and, if not, then the 1929 by-law effects an inverse condemnation of Petitioner's property. Parties are obliged to alert this Court to new factual matters that could significantly impact potential rulings on the merits of the case. A factual development that directly affects the inverse condemnation argument has just occurred, is highly relevant to the analysis of this action, and is discussed below.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner has argued that the physical condition of locus is such that mining is the only use to which locus can be put and if mining is ruled illegal, the property is effectively rendered worthless. Petitioner claims that this amounts to inverse condemnation.

Thus, it was with heightened interest that on Thursday, July 13, 2006 Counsel of Record attended a meeting with a local real estate developer and his counsel to which Counsel of Record had been recently invited (see affidavit, R. App. F). The expressed purpose of the meeting was for the developer and his counsel to receive informal input from the Town's Legal and Growth Management Departments regarding potential development of the very locus that is the subject of this action. Under discussion was a proposal to create a so-called "40B project" of ninety-three (93) units of single and multi-family housing under the Commonwealth's super-zoning statute that encourages affordable housing[1]. Any such plan would

---

[1]. Massachusetts General Laws, Chapter 40B, Section 21, *et seq.* The statute's purpose is to streamline the application process. Its administrative appellate process provides for an accelerated

initially be reviewed by the Town's Zoning Board of Appeals, the Respondent herein.

Presented as part of this presentation was a seventeen page portfolio of plans (R. App. G)[2] showing locus and bearing the date of June 23, 2006. The plans list one Christopher Keyes as the person for whom the plans were prepared. Keyes is the principal of the corporate petitioner in this action, (R. App. F).

ADDITIONAL REASON TO DENY THE PETITION

On the basis of the plan of development for locus presented for initial discussion (R. App. G), it would appear that Petitioner's argument relating to inverse condemnation is either a bit overstated or premature. How Petitioner can argue that it has no ability to use its land except for illegal mining and simultaneously pursue a potential ninety-three unit housing development gives pause, to say the least.

The consequences of this approach should pose less of dilemma for this Court. Apparently by its own hand, Petitioner has demonstrated that its land is not as barren, wasted, and valueless as it has argued. To the contrary, the potential for development and infusion of value is very real.

---

review and rejection of locally imposed conditions that render a project uneconomical. It is an ideal tool to assist municipalities in meeting state-mandated affordable housing goals and to overcome local NIMBY (not-in-my-back-yard) opposition. It is one of the many resources available to an enlightened property owner who desires to develop his property in the face of strong opposition.

[2] The cover and second page of the plans are reproduced here as Appendix G. The cover page shows the outline of locus with the proposed sites for housing units. The second page shows an artist's rendering of the proposed structures. The remaining fifteen pages show construction details not relevant to the argument presented here and are therefore not reproduced.

Petitioner's inverse condemnation argument is thus exposed as both disingenuous and apparently irrelevant.

Respectfully submitted,

ROBERT D. SMITH, Town Attorney
Counsel of Record

T. DAVID HOUGHTON
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

July 2006

APPENDIX F – AFFIDAVIT OF CHARLES S. McLAUGHLIN, JR., ESQ. DATED JULY 17, 2006

AFFIDAVIT OF CHARLES S. McLAUGHLIN, JR.

I, Charles S. McLaughlin, Jr., state the following to the best of my personal knowledge and belief:

1. I have been a member of the Bar of the Commonwealth of Massachusetts for thirty-two years. I serve as assistant town attorney for the Town of Barnstable, the Respondent herein.

2. On Thursday, July 12, 2006, I was invited to a presentation at my office to be given by Attorney Michael J. Princi and his client, Douglas Lebel, a local real estate developer. Also in attendance were Counsel of Record, Town Attorney Robert D. Smith, and former assistant town attorney and trial counsel in this matter, Ruth D. Weil. Ms. Weil now serves as Director of the Town of Barnstable's Growth Management Department.

3. Attorney Princi and Mr. Lebel explained that Mr. Lebel was present to explore the Town's reaction to a tentative proposal to develop ninety-three units of housing, of which at least 25% would be "affordable", on the property that is the subject of this action. The proposal would be processed under Chapter 40 B of the General Laws of the Commonwealth of Massachusetts.

4. Mr. Lebel indicated that he had been in discussions with Mr. Christopher Keyes[1] concerning his possible purchase of locus and/or joint development of locus. Mr. Lebel did not reveal how long these discussions had been on-going or his legal relationship, if any, with either Mr. Keyes or Gifford Brothers Sand and Gravel, Inc.

5. Mr. Lebel presented what he described as "very preliminary" plans for the development of locus. The plans totaled seventeen pages. The first two pages are reproduced in Appendix G to Respondent's Supplemental Response. The first page of the Plans is a site plan of locus showing possible locations of forty-five single housing units and forty-eight multi-family units. It contains the notations, "Prepared for CHRISTOPHER KEYES" and "DATE: June 23, 2006". The second page displays what Mr. Lebel described as an artist's rendering of the elevations of the proposed structures. The remaining fifteen pages consisted of floor plans and construction details and are not reproduced in the Record.

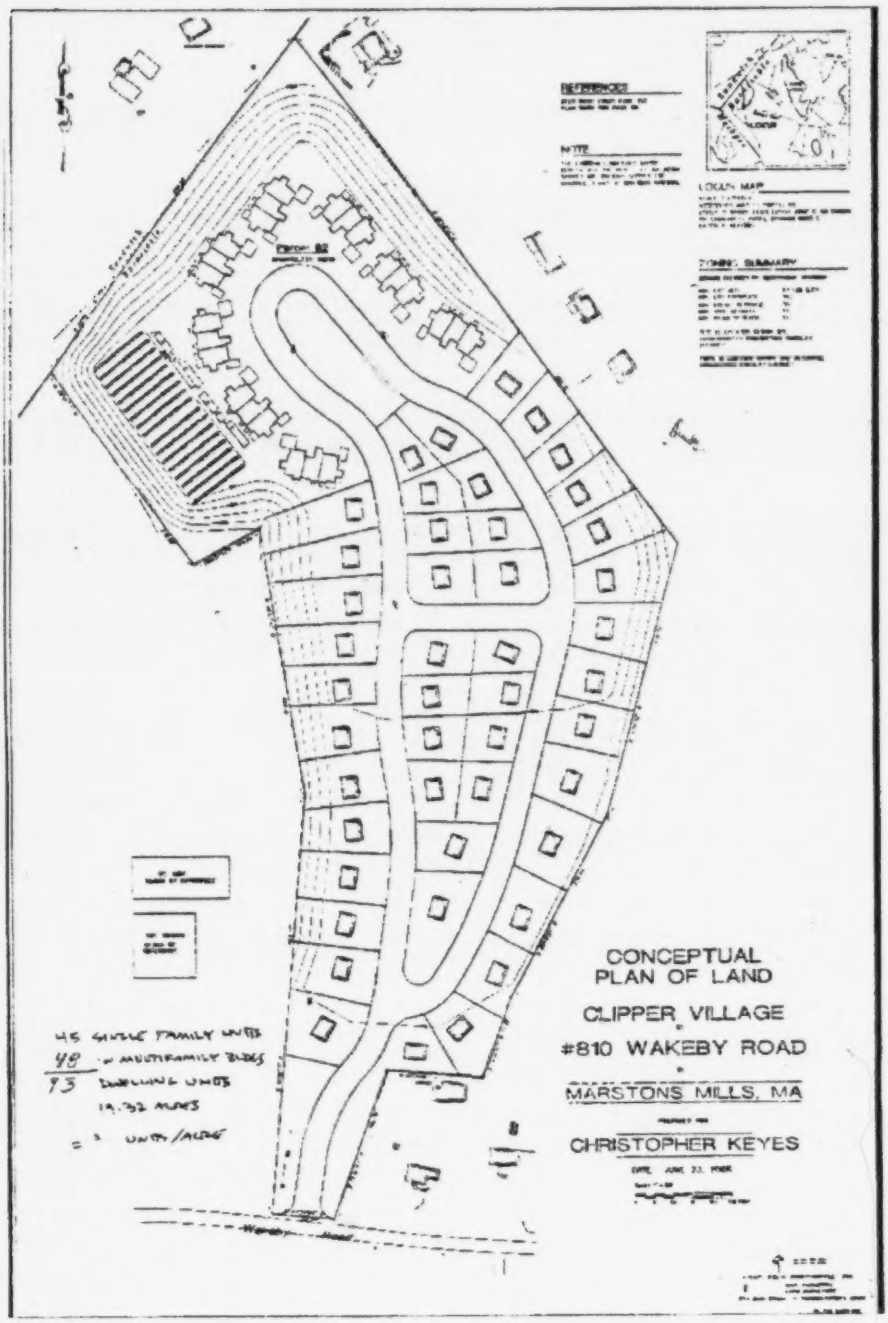
Signed under the pains and penalties of perjury at Barnstable, Massachusetts this 17th day of July 2006.

/s/ Charles S. McLaughlin, Jr.
Charles S. McLaughlin, Jr.

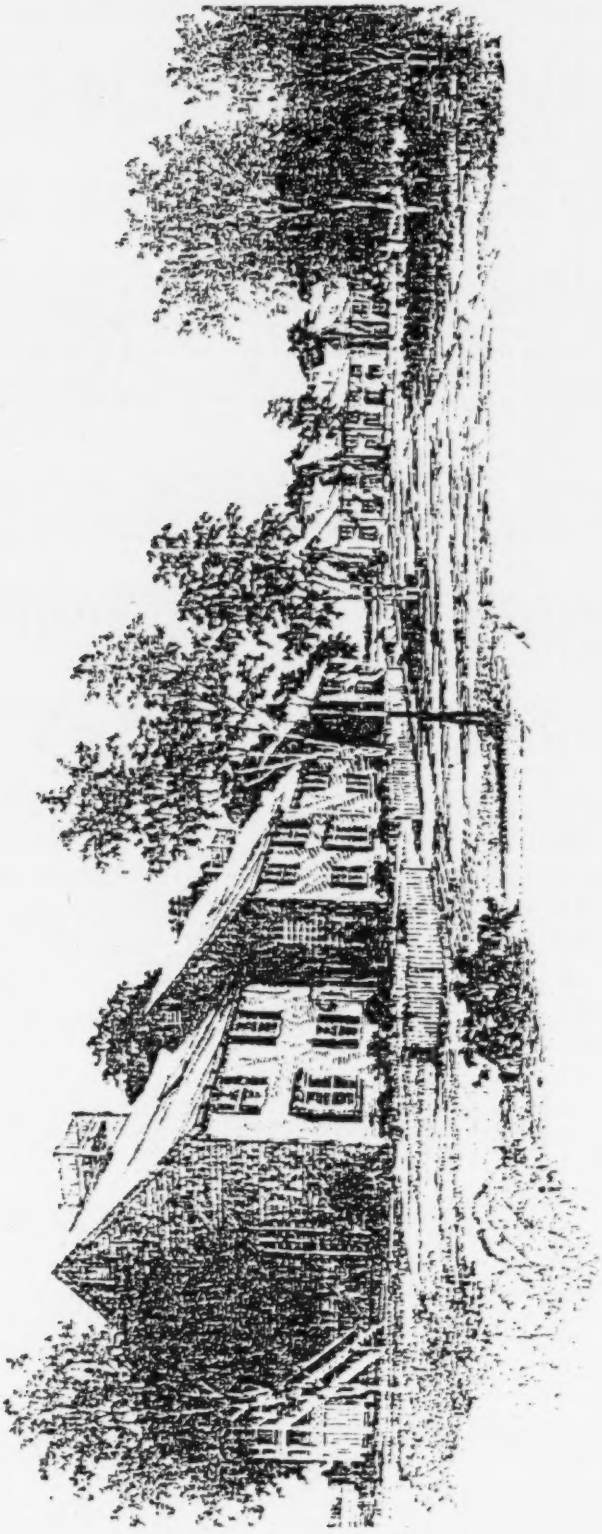
---

[1] An on-line examination of corporate records at the Massachusetts Secretary of State's office indicates that Christopher Keyes is President of Gifford Brothers Sand and Gravel, Inc., the Petitioner in this matter.

APPENDIX G



BEST AVAILABLE COPY



APPENDIX H

MASSACHUSETTS GENERAL LAWS

CHAPTER 40B. REGIONAL PLANNING

LOW AND MODERATE INCOME HOUSING

Chapter 40B: Section 21. Low or moderate income housing; applications for approval of proposed construction; hearing; appeal

Section 21. Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals, established under section twelve of chapter forty A, a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The board of appeals shall

adopt rules, not inconsistent with the purposes of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk. The provisions of section eleven of chapter forty A shall apply to all such hearings. The board of appeals shall render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A.

(4)

No. 05-1533

FILED
JUL 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

GIFFORD BROTHERS SAND AND GRAVEL, INC.,

Petitioner,

v.

ZONING BOARD OF APPEALS OF BARNSTABLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

RESPONDENT, TOWN OF BARNSTABLE'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT D. SMITH, Town Attorney,
Counsel of Record

T. DAVID HOUGHTON,
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

June 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. Is there a compelling issue presented that warrants this Court's further examination of a matter that should be decided on a state's principles of zoning law?

II. Where the Supreme Judicial Court of Massachusetts exercised its discretion to deny an application for Further Appellate Review filed two years and nine months late, should that exercise of discretion be reversed?

III. Where no motion for new trial has ever been presented to the Trial Court, should this relief now be granted by this Court?

IV. To the extent that enforcement of a valid residential zoning ordinance puts an end to an illegal commercial use of a property, does this amount to an inverse condemnation of the property?

[This page is intentionally left blank.]

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

JURISDICTION OF THE COURT 1

STATEMENT OF THE CASE 2

A. Substantive Background 2

B. Procedural Background 4

C. Factual Inaccuracies and Clarifications 7

REASONS TO DENY THE PETITION 9

I. The Decisions Of The Supreme Judicial Court And Appeals Court Of The Commonwealth Of Massachusetts Are Entitled To A High Degree Of Deference. 9

A. The granting of a FAR Application must be founded on upon substantial reasons affecting the public interest or the interests of justice. 10

B. Whether ruling on the merits or on the Petitioner's procedural lapses, the Supreme Judicial Court exercised its FAR discretion reasonably. 11

1. Substantively, the validity of a zoning enactment in Massachusetts that breaks an entire town into two zoning districts, business and residential, is well settled and in accord with the Appeals Court decision in this matter. 11

2. Procedurally, rejecting a FAR application presented two years and nine months late is certainly within the proper exercise of the Supreme Judicial Court's discretion. 12

3. Procedurally, a late motion for re-hearing with the State Appeals Court would justify both the Appeals Court denial of the motion and the refusal of the Supreme Judicial Court to further review the matter. 13

II. Petitioner's Demand Amounts To A Motion For A New Trial. It Is Seven Years Late And Unsupported. 14

A. There is no record to support the assertion that "new" evidence offered by affidavit could not have been discovered before trial. 15

B. Even if timely presented, the "new evidence" proffered affidavits would not support a motion for new trial. 16

C. Incompetence of Trial Counsel: Even with no express time constraints to raise this matter, the trial judge has never been asked to do so. 17

III. Neither Enactment Nor Enforcement Of A Valid Zoning Ordinance Is A Taking. 18

A. Adopting town-wide zoning that prohibits certain activities is clearly a permissible undertaking. 18

B. Affirming the ban of commercial activities on locus is neither a taking nor an inverse condemnation. 18

C. The taking claim is not ripe because there has been neither pursuit nor denial of just compensation. 19

D. It is factually untrue that Petitioner has no other uses for its property. 19

E. Petitioner has not pursued or exhausted its range of remedies that would infuse value into its property. 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

Brown v. Penn. R.R., 282 F.2d 522 (3rd Cir. 1960), cert. denied 365 U.S. 818, 81 S. Ct. 690, 5 L.Ed.2d 696 (1961) 16

Cheang-Kee v. United States, 70 U.S. 320 (1865) 9

Daddario v. Cape Cod Commission, 425 Mass. 411 (1997) 18

Farmers Co-operative Elevator Association v. Strand, 382 F.2d 224 (8th Cir. 1978) 15

Flett v. W.A. Alexander & Co., 302 F. 2d 321(7th Cir.), *cert. denied* 371 U.S. 841, 83 S. Ct. 71, 9 L.Ed.2d 77 (1962) 15

Gage v. Egremont,
409 Mass 345, 566 N.E. 2d 1597 (1991) 11

Giordano v. McCartney,
385 F.2d 154 (3rd Cir. 1967) 16

MacDonald, Sommer & Frates v. County of Yolo,
477 U.S. 340 (1986) 20

Marietta Realty, Inc. v. Springfield Redevelopment
Authority, 902 F. Supp. 310
(D. Mass. 1995) 19

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 20

Penn Central Transportation Co. v.
New York City, 438 U.S. 104 (1978) 18

Village of Euclid, Ohio v. Amber Realty Co.,
272 U.S. 365 (1926) 18

Williamson County Regional Planning Commission
v. Hamilton Bank, 473 U.S. 172 (1985) 19

RULES:

Massachusetts Rules of Appellate Procedure

Rule 27.1 .....6, 7, 10, 12

Massachusetts Rules of Civil Procedure

Rule 60(b) 14, 17

Supreme Court Rule 15(2) 7

JURISDICTION OF THE COURT

The Petitioner's jurisdictional statement is incomplete in two vital respects and therefore potentially misleading.

Petitioner filed a single motion in the Commonwealth's Appeals Court to Extend Time to File a Petition for Rehearing and for Leave to File an Application for Further Appellate Review with the Commonwealth's Supreme Judicial Court (Appeals Court docket, Respondent's Appendix D, pp. 15a-20a)[1]. The Appeals Court did two things.

First, the Appeals Court extended the time to file for re-hearing, directing that Petitioner do so by December 19, 2002. Petitioner failed to comply with that order. However, a Petition for Re-hearing was filed on December 20, 2002, one day late. The Appeals Court then denied the Petition without comment.

Secondly, the state Appeals Court notified petitioner's current counsel that any petition for Further Appellate Review (FAR) would need to be filed directly with the Commonwealth's Supreme Judicial Court. On December 11, 2002, counsel announced in a letter to the Clerk of the Supreme Judicial Court that he intended to do so[2].

Nevertheless, nothing (no FAR Application, no motion to extend the time for filing a FAR, no motion for extraordinary relief given co-counsel's alleged incapacity, no motion to withdraw appearance, and

---

[1] For clarity, references to Appendix items in Respondent's Brief will be referred to as "R. App, etc". Reference to such items in Petitioner's Brief will be referred to as, simply, "App., etc.)

[2] In a letter dated December 11, 2002 directed to the Clerk of the Supreme Judicial Court (R. App. A, pp. 1a-2a), current counsel for the Petitioner stated in part, "I am writing to confirm the above because at this time it is my intent to file a Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review."

apparently no timely or effective follow-up with alleged successor counsel ... in short, nothing) was done, filed, requested, or advanced for two years and nine months after the required twenty-day deadline for filing a FAR petition.

Finally, on October 7, 2005, a Motion to File a FAR Application Late, accompanied by the FAR application itself, was docketed in the Supreme Judicial Court which denied the Application without comment on December 21, 2005 (R. App. E, pp. 21a-23a).

STATEMENT OF THE CASE

A. Substantive Background

This is a routine zoning case that focuses on Petitioner's mining of sand and gravel on a 16.6 acre parcel in a residential zone. Having received a cease and desist order from the Town, the petitioner appealed the order to the Town's Zoning Board of Appeals on the theory that the commercial use of the property was a protected, non-conforming use.

In 1929, Barnstable enacted its first zoning by-law that created two zones, business and residential. The business zone consisted of all properties that were then devoted to business use. The residential zone consisted of all remaining property in town (App. A: pp. 2a – 3a; App. B, pp. 11a-12a).

In 1956, Barnstable revised the zoning by-law, placing locus entirely in a residential zone, a classification that continues to date (App. A: pp. 2a; App. B: p. 12a).

The outcome of the action is dependant on the validity of the 1929 zoning enactment. If valid, all of Petitioner's commercial activities are illegal. On the other hand, if the 1929 by-law is invalid, the 1956 by-law controls; however, only that portion of Petitioner's

property devoted to mining activities in 1956 is protected as a non-conforming use.

The trial court found as fact that locus was virgin land until about 1947 when commercial activity began (App. B: p. 8a - #4). At that time, Petitioner's predecessor in title began to operate a sand and gravel pit, a contractor's storage yard, and a junkyard on portions of a 16.6 acre site (App. B: pp. 8a-10a). At trial, Petitioner presented little or no evidence concerning pre-1929 use[3] and the trial court made no findings as to pre-1929 use (App. B: pp. 7a-14a).

The trial court found that until about 1996, the mining operation occupied, at most, about five acres of the property (App. B: p. 21a). In 1996, Petitioner greatly expanded mining operations (App. B: p. 10a).

Having ruled that the 1956 by-law was controlling, the trial judge next addressed the physical extent and character of the non-conforming mining use. As a matter of law, he therefore limited mining to the five acre site in use before the 1956 by-law enactment. He did so even as he acknowledged that the five acres had been effectively stripped of all of its resources and that Petitioner would thus be left with the ephemeral right to mine only "air" (App. B: p. 24a).

In related rulings, the trial court rejected Petitioner's argument that the property owner's intent to mine the whole property should control to allow expansion of the protected non-conforming use. To the contrary, the trial court found as fact that not only had no such intent been proven, but that a clear contrary intent had been shown (App. B: pp. 9a, 17a).

---

[3] This was apparently a tactical decision made by trial counsel, given the trial judge's focus in a pre-trial conference on the 1956 by-law. See a discussion of the issue at paragraphs 21-22 in Petitioner's Motion to Enlarge Time (R. App. B, pp. 3a-9a) filed with the Supreme Judicial Court in October 2005.

Petitioner's intent argument was therefore rejected (App. B: pp. 21a-22a).

Petitioner alternatively argued at trial that the mining should be allowed on all of locus on a so-called "diminishing assets" theory of law adopted in some jurisdictions but previously rejected in Massachusetts (App. B: pp. 20a-21a). Because of the violence that this theory of law would wreak on the residential zoning scheme in general and the immediate residential neighbors in particular, the trial court declined to adopt Petitioner's "diminishing assets" argument to justify expansion of the supposed legal non-conforming mining use (App. B: pp. 18a-21a).

The Commonwealth's Appeals Court overruled the trial court and found that the 1929 enactment was a validly adopted and enforceable by-law (App. A: p. 5a). Absent appropriate variances or other zoning relief, the Appeals Court ruled that all mining operations and other commercial activity begun on this virgin parcel in 1947 were illegal (App. A: p. 5a). Lacking any such exception, mining sand and gravel from locus was at all relevant times an illegal commercial enterprise. Having so ruled, the Appeals Court found it unnecessary to address Petitioner's remaining arguments.

Neither outcome is acceptable to Petitioner as his mining activities by operation of law or fact have come to an end.

B. Procedural Background

Both the denial of Petitioner's motion for re-hearing in the Appeals Court and the Supreme Judicial Court's denial of the motion for Further Appellate Review were summary in nature and unexplained. Because the outcome at the State level could well have been based on Petitioner's procedural failings, a

statement of this case would be incomplete without a brief recitation of critical procedural history at the state level.

The genesis of this matter stems from a cease and desist order issued by Barnstable's zoning enforcement officer on October 22, 1997. Barnstable's Zoning Board of Appeals denied the Petitioner's appeal after hearing in a decision dated January 27, 1998. Petitioner's complaint was timely filed with the trial court in February of 1998, followed by a pre-trial conference and filing of memoranda in December 1998 (R. App. C, pp. 10a-14a). A jury-waived trial lasting approximately three days commenced in April 1999 followed by the trial court's findings and rulings in June 1999. After a motion to alter the judgment was denied, cross appeals were filed, the record assembled, the case entered in the Appeals Court in April of 2000, Petitioner's brief filed in October 2000, and oral argument held in May of 2002.

It is important to note that throughout this entire five year period, Petitioner was represented very vigorously by Attorney Gregory M. Downs who briefed and tried this matter in the lower court. Subsequently, Attorney James W. Stathopolous, Petitioner's counsel in the instant proceedings, filed his appearance as co-counsel in the state Appeals Court matter; both Messrs. Downs and Stathopolous appeared for oral argument before the Appeals Court while the latter actually argued the matter to the panel.

In its Appeals Court brief, the Petitioner identified three issues for the Court's consideration. First, it asked, "Whether the trial court erred in limiting the area of continued operation of the sand a gravel pit based on the uncontroverted testimony showing a clear intent of the property owner to use the entire parcel at the time the applicable zoning went into effect?" Secondly, it asked, "Whether the diminishing assets theory of the majority of jurisdictions should be

adopted by the Commonwealth when dealing with 'an assets extraction prior non-conforming use'"? Thirdly, Petitioner argued that trial court's findings and rulings with respect to the 1929 by-law should be upheld. Those are the only issues argued and briefed for the Appeals Court and it was upon those arguments that the Appeals Court expressly ruled.

The decision of the Commonwealth's Appeals Court was rendered on October 28, 2002. Petitioner then filed a motion in the Appeals Court to extend the time to file a motion for rehearing before the Appeals Court and for leave to file an application for Further Appellate Review (FAR) with the state's highest court, the Supreme Judicial Court. The Appeals Court allowed the motion to file for rehearing late and directed counsel to file the motion for rehearing by December 19, 2002.

In the same order, Petitioner was directed to file its intended Application for Further Appellate Review (FAR) directly with the Supreme Judicial Court (R. App. D, p. 19a, notation #16).

However, contrary to the Court's order, the motion for rehearing was not filed until December 20, 2002, one day after the deadline. Without hearing and without further explaining its reasoning, the Appeals Court denied the motion for re-hearing.

Thereafter, no pleadings of any sort were filed with any court until October 7, 2005 when a motion to file FAR application late and the FAR application itself were filed with the Commonwealth's Supreme Judicial Court (R. App. E, p. 21a).

It is particularly noteworthy that two years, nine months, and twenty-eight days had elapsed from the Appeals Court's denial of Petitioner's motion for rehearing until the FAR filing. It is equally noteworthy that Rule 27.1 (a) of the Massachusetts Rules of Appellate Procedure requires that a FAR application

be filed within twenty (20) days of the rescript of the Appeals Court[4]. Thus, on December 21, 2005, the Supreme Judicial Court denied the FAR application without comment.

C. Factual Inaccuracies and Clarifications

Pursuant to the requirements of Sup. Ct. R. 15 (2), the Respondent Town wishes to correct a number of factual misstatements in Petitioner's brief, as follows:

1. The evidence at trial supports the conclusion that commercial mining began on site not earlier that 1947, not eighty-five years ago (Petitioner's Brief, p. 2) or "around the turn of the century (1900)" as alleged (App. B: p. 10a).

2. As part of the Town's landfill capping procedure, the Town contracted with an independent contractor to supply materials and did not, as alleged, contract with the Petitioner for this purpose. That contractor purchased at least some of the sand and gravel for the project from the Petitioner (App. B: p. 10a).

3. Contrary to Petitioner's brief, the trial court did not find the 1929 zoning by-law unconstitutional. Rather, he found

---

[4] Rule 27.1 (a) of the Massachusetts Rules of Appellate Procedure states in part: "Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice ..."

that it "runs afoul of the zoning enabling act of the era."(App. B: p. 15a).

4. Petitioner alleges, in essence, the mental incompetence of trial counsel (Attorney Downes). Respondent points out that trial counsel engaged in a three-day trial and competently brought forth many issues for the court's consideration. Trial counsel then prepared an extensive brief for the Commonwealth's Appeals Court and joined present counsel in argument there. In the meantime, present counsel entered a general appearance before the Appeals Court and never raised the issue of trial counsel's alleged incompetence by way of appropriate motions until submitting a written request for a re-hearing submitted to a single justice of the Appeals Court.

5. Petitioner alleges that two disinterested witnesses whose affidavits are before this Court document pre-1929 commercial activity on site and the brief suggests that one of the individuals at one time occupied an official position apparently with the Respondent Town (Petitioner's Brief, p. 4). In fact, an examination of Petitioner's affidavits reveals no support for this latter representation. Additionally, the affidavits are very general and provide no illumination as the location or extent of any mining operations supposedly observed by these alleged witnesses. Additionally, there is no showing or allegation that these individuals were unavailable, unknown, and/or not susceptible of identification before trial.

6. Petitioner alleges the all commercial uses on the property are precluded by the Appeals Court decision and the decision amounts to an inverse condemnation. The bald statement is unsupported by any expert engineering or appraisal data. There is no evidence offered as to suitability of the property for the permitted uses that include the single-family residential use.

REASONS TO DENY THE PETITION

There is no federal question whatsoever presented nor has Petitioner shown any compelling reason to grant the Petition.

I. The Decisions Of The Supreme Judicial Court And Appeals Court Of The Commonwealth Of Massachusetts Are Entitled To A High Degree Of Deference.

The narrow question before this Court is whether the Supreme Judicial Court of Massachusetts appropriately exercised its discretion in denying an Application for Further Appellate Review (FAR) filed almost three years after the decision of the Commonwealth's Appeals Court. This Court has long and consistently ruled that it will not upset a lower court decision if it was properly within the reasonable exercise of the lower court's discretion. See *Cheang-Kee v. United States*, 70 U.S. 320 (1865) where the Court noted at page 326 that "... matters wholly within the discretion of the Circuit Court ... are not reviewable here."

A. The granting of a FAR Application must be founded upon substantial reasons affecting the public interest or the interests of justice.

The decision to grant a FAR application is a discretionary function of Court[5].

Rule 27.1 of the Massachusetts Rules of Appellate Procedure makes it clear beyond debate that, in order for a FAR application to be granted, the questions presented must conjure judicial visions of matters that are truly consequential for the public interest or are vital to the interests of justice. The Supreme Judicial Court is in the best position to determine whether this test has been met and the denial of the application without comment speaks loudly to the Court's negative conclusion.

---

[5] As the 1973 Reporter's Notes to Massachusetts Rules of Appellate Procedure Rule 27.1 observe, "Further review is analogous to the granting of certiorari by the Supreme Court of the United States." Granting of an application for further appellate review requires a vote of three justices of the Supreme Judicial Court (Mass. R. App. P. 27.1(e)).

B. Whether ruling on the merits or on the Petitioner's procedural lapses, the Supreme Judicial Court exercised its FAR discretion reasonably.

1. Substantively, the validity of a zoning enactment in Massachusetts that breaks an entire town into two zoning districts, business and residential, is well settled and in accord with the Appeals Court decision in this matter.

This is nothing more than a garden-variety zoning case. The Town's 1929 by-law classified the entire town into either a business or a residential district. Then-existing business property was zoned business. The balance of the Town was zoned residential.

In ruling that the 1929 enactment was legal and in rejecting Petitioner's claim of spot-zoning, the State Appeals Court followed a well-established line of precedent in the Commonwealth. See *Gage v. Egremont*, 409 Mass 345, 566 N.E. 2d 1597 (1991) where a zoning by-law remarkably similar to Barnstable's 1929 by-law was upheld by the Supreme Judicial Court. In rejecting further review of the Appeals Court decision on the merits of this action, the Supreme Judicial Court was not venturing into uncharted waters and was well within precedent to do so.

Petitioner's attack on the town's 1929 zoning enactment is further hobbled because it presented no credible evidence to the Trial Court regarding its pre-1929 commercial activities, either because it had none or because it chose to focus on the 1956 zoning amendment and subsequent on-site activity. See Petitioner's comment on its choice of tactics as

contained in its brief in support of its application for FAR, attached and discussed in footnote 2, above.

This tactical trial decision was made at Petitioner's peril and compelled the trial court to rule that this virgin land was partially converted to commercial activities not earlier than 1947. This finding of fact is absolutely fatal to Petitioner's claim that it can mine its entire property, not just the five acre site.

There was nothing presented to the Supreme Judicial Court on the merits that would require a finding that matters presented were vital to the public interest or that would affect the interests of justice. Given the high bar set for the granting of a FAR application, the Supreme Judicial Court was not only well within the limits of its discretion in rejecting the application, but was virtually required to do so.

2. Procedurally, rejecting a FAR application presented two years and nine months late is certainly within the proper exercise of the Supreme Judicial Court's discretion.

Procedurally, either a late FAR application to the Supreme Judicial Court or a late motion for re-hearing presented to the Appeals Court would be fatal to Petitioner's claim.

Here, the more deadly lapse involves Rule 27.1 of the Massachusetts Rules of Appellate Procedure. It requires that an application for FAR be filed with the Supreme Judicial Court within twenty (20) days of a decision of the lower Court. See footnote 3, above. This FAR petition was filed, not twenty *days*, but *two years and nine months* after the decision on the merits of the case by the Appeals Court.

While Petitioner argued before the Supreme Judicial Court in its FAR Application that successor counsel (an Attorney Joseph Runci) did nothing (including filing an appearance as successor counsel) before Runci's untimely death, and now continues to argue that his co-counsel (Attorney Downes) did nothing because of incapacity, Petitioner ignores the fact that its current counsel remained counsel of record before the Appeals Court, that current counsel had announced his intention to file a FAR application well before the Appeals Court had finally ruled on the case, and that current counsel filed nothing to elicit support from the Supreme Judicial Court to extend the FAR filing deadline for thirty-three months.

If there was ever a textbook example of a self-inflicted procedural wound that is, will always be, and should be fatal, this case is a prime example of it. On this reason alone, Massachusetts' highest court was well within the limits of its discretion in denying the FAR application.

3. Procedurally, a late motion for re-hearing with the State Appeals Court would justify both the Appeals Court denial of the motion and the refusal of the Supreme Judicial Court to further review the matter.

If the focus of review is on the Supreme Judicial Court's affirmation of the Appeals Court denial of Petitioner's Motion for Re-hearing, the result is and should be the same.

In the Appeals Court action, Petitioner's current counsel filed a request to a justice of the state Appeals Court to extend the time for filing a petition for re-hearing. This request was allowed and gave the

Petitioner more than three weeks to file its motion with a date-certain for filing specified in the order.

As the Appeals Court docket makes so painfully clear, Petitioner then missed the filing deadline by one day. Without moving the Court to further extend the deadline and without explanation for the delay, Petitioner nevertheless filed its Motion for Re-hearing. To no one's surprise, save only that of the Petitioner, the motion for re-hearing was denied without explanation or comment.

Once again, in tacitly accepting the Appeals Court ruling, Massachusetts' highest court would be and was well within the limits of its discretion in denying the FAR application.

Based on either the substantive or procedural conclusions that Respondent respectfully argues should be drawn at this point, this Court's inquiry ought not to proceed further. The Petition for Writ of Certiorari is without merit and should be denied without further inquiry.

However, because Petitioner raises other ancillary issues in its brief, Respondent will offer the following observations.

II. Petitioner's Demand Amounts To A Motion For A New Trial. It Is Seven Years Late And Unsupported.

Rule 60(b) of the Massachusetts Rules of Civil Procedure discusses the granting of new trial.[6] A

---

[6] In relevant part, Rule 60(b) notes, "On motion and upon such terms as are just, the court may relieve a party or his representative from a final judgment ... for the following reasons: (1) mistake, inadvertence, surprise, or ***excusable neglect***; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); ... (6) ***any other reason justifying relief from the operation of***

motion for relief from judgment or order is addressed to the trial judge's discretion and is generally not reviewable except for a clear abuse of discretion. See Reporter's Notes – 1973, citing *Farmers Co-operative Elevator Association v. Strand*, 382 F.2d 224 (8th Cir. 1978).

Thus, a motion to set aside the judgment for "excusable neglect" or for "newly discovered evidence" should have been presented to the trial judge within one year of entry of judgment. Petitioner offers no explanation as to why such a motion could not have been filed with the trial judge in this time frame. To ask for a new trial now is untimely and not presented to the appropriate court.

A. There is no record to support the assertion that "new" evidence offered by affidavit could not have been discovered before trial.

As the Reporter notes, "The movant bears the burden of showing that the evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(b)" quoting *Flett v. W.A. Alexander & Co.*, 302 F. 2d 321, 324 (7th Cir.), *cert. denied* 371 U.S. 841, 83 S. Ct. 71, 9 L.Ed.2d 77 (1962):

> "Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances."

As the affidavits presented in the record demonstrate, both affiants are life-long residents of Cape Cod and presumably were available to trial

---

the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment ... was entered..." (Emphasis provided.)

counsel before and during the trial of this action. Certainly, there has been no demonstration in the record that Petitioner was excusably ignorant of the existence of this evidence. *Brown v. Penn. R.R.*, 282 F.2d 522 (3rd Cir. 1960), *cert. denied* 365 U.S. 818, 81 S. Ct. 690, 5 L.Ed.2d 696 (1961).

B. Even if timely presented, the "new evidence" proffered in affidavits would not support a motion for new trial.

In requesting a new trial, the Reporter notes that Petitioner must show that "the evidence must be of a material nature and so controlling as probably to induce a different result", citing *Giordano v. McCartney*, 385 F.2d 154 (3rd Cir. 1967).

Here, the trial court found that site-specific testimony showed that the property was virgin land in 1947. And an aerial photograph from 1956[7] is in stark contrast to the vague recollections and generalizations of affiants who are now aged 87 and 91 whose recollections were formed between ages 6 to 10 (App. D, Rennie affidavit) and at age 5 (App. E, Ellis affidavit). And neither affidavit expressly ties the observations to a specific parcel of land, or any specific portion thereof.

Additionally, it can hardly be said that the affidavits would outweigh the photographic evidence before the trial court, evidence that directly contradicts the substance and implications of these affidavits. The *Giordano* standard has not been met and these affidavits are insufficient to support a motion for new trial.

---

[7] The trial court refers to this photo as a 1964 photo (Trial Exhibit 25) although it was actually taken in 1956. See Appendix B, Page 8a, Finding number 6. The Town's motion to correct the record was not acted upon.

C. Incompetence of Trial Counsel: Even with no express time constraints to raise this matter, the trial judge has never been asked to do so.

While motions for new trial based on newly discovered evidence or excusable neglect face a one year time restriction, a Rule 60(b)(6) motion asking for a new trial for ***"Any other reason justifying relief from the operation of the judgment"*** has no such time limit. It must be presented simply within a **"reasonable time"**.

Relief from judgment based on trial counsel's alleged disability would certainly be cognizable and no doubt reviewed by the trial judge with concern, if not sympathy, under Mass. R. Civ. P. Rule 60(b)(6).

Inexplicably, Petitioner has never broached the subject of trial counsel's alleged incapacity with the trial judge, choosing instead to ask appellate courts for that relief. Obviously, the trial judge would have been in the best position to have observed trial counsel's demeanor and competence. Nevertheless in spite of, or perhaps precisely because of, the trial judge's vantage point, Petitioner has avoided asking for Rule 60(b)(6) relief altogether.

Nor has Petitioner presented any expert medical evidence by affidavit or otherwise that supports the allegation that counsel was medically disabled prior to or during trial.

Finally, it should be observed that if trial counsel was not disabled until some time post-trial, subsequent disability while regrettable would not *per se* be a basis for reopening the trial.

On the state of the record, one can only guess at the state of trial counsel's was at any point in time. When being asked to overturn the decisions of both a trial court and an appeals court for such an

extraordinary reason, both this Court and the Supreme Judicial Court are entitled to a far more robust record on the subject than presented here.

III. Neither Enactment Nor Enforcement Of A Valid Zoning Ordinance Is A Taking.

A. Adopting town-wide zoning that prohibits certain activities is clearly a permissible undertaking.

By their very nature, zoning enactments allow some activities and deny, restrict, or condition other activities. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The fact that certain uses within a given zone may be eliminated or constricted does not give rise to a claim for condemnation as long as there are some activities and associated inherent value to which the property can still be put. See *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926); *Daddario v. Cape Cod Commission*, 425 Mass. 411 (1997).

B. Affirming the ban of commercial activities on locus is neither a taking nor an inverse condemnation.

Here, Petitioner apparently claims (Petitioner's Brief, p. 7) that the decisions of the Massachusetts Courts, when applied to Petitioner's property, work to effectively produce an inverse condemnation. At least as described in Petitioner's brief, it is not an action of the municipal Respondent that is objected to, but rather the *effect* that the judicial process will have on Petitioner's land that is problematic.

The axiom, "no action, no taking", applies. The fact that Petitioner's illegal use of the property is declared

illegal, combined with the fact that Petitioner has supposedly destroyed its property such that only illegal use of locus will render value to Petitioner, is neither the Town's responsibility nor a compensable event.

C. The taking claim is not ripe because there has been neither pursuit nor denial of just compensation.

In an action where inverse condemnation is claimed, it is incumbent upon the property owner to pursue available remedies for just compensation. Otherwise, a constitutional claim will be deemed premature. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

Massachusetts has such a process and that process has been found to be adequate. *Marietta Realty, Inc. v. Springfield Redevelopment Authority*, 902 F. Supp. 310 (D. Mass. 1995).

Having failed to pursue compensation, Petitioner's constitutional claims should not lie.

D. It is factually untrue that Petitioner has no other uses for its property.

Petitioner' brief asserts (Brief, p. 7) that it has no practical ability to use its property unless allowed to mine it in violation of applicable zoning. That assertion is simply inaccurate.

As a matter of right, current zoning allows Petitioner to use the property as a single lot for single family housing. Even with some costs for restoration and landscaping (made necessary only because of Petitioner's rapacious use of the land), a sixteen acre, single family lot on Cape Cod today is worth a small

fortune. There has been no demonstration by Petitioner at any level of the proceedings to support the bald claim that restricting use of the property to residential renders it worthless.

Additionally, existing permits allow some commercial use of locus. The fact that the permits have a limited life does not mean that they cannot be fully enjoyed at the present time.

E. Petitioner has not pursued or exhausted its range of remedies that would infuse value into its property.

Petitioner has never attempted to explore alternative administrative or legislative relief with the Respondent Town. With more than sixteen acres available to be subdivided and sold off, there has been no effort to do so. The inherent value of real property on Cape Cod in general, and perhaps to abutters in particular, remains unexplored.

As mentioned previously, the property enjoys the benefit of permits that allow some commercial activity at locus. No attempt to extend or modify these permits for other uses has been explored. Other development options that need not be explored here are also potentially available. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); see also *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) where the Court noted the need to exhaust administrative remedies to determine whether a regulation amounted to a taking, and said, "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

Petitioner's lack of initiative and imagination do not equate to a denial of any practical use of the property.

CONCLUSION

The Petitioner has achieved the dubious accomplishment of having so badly and illegally managed its land that Petitioner now asserts the property is no longer suitable for its one legal use, single-family residences. If that were not enough, Petitioner now seeks to have the Town compensate it for its own mis-management. One is reminded of the old saw about the child who, having dispatched his parents, now claims the court's mercy because he has recently been orphaned.

There is simply no Federal issue presented that has not been thoroughly resolved for years nor are there any other compelling reasons to grant this Petition. There comes a time when a case needs to be finally resolved; in this action, that time is long past. Therefore, the Respondent respectfully requests that this Petition be denied.

Respectfully submitted,

ROBERT D. SMITH, Town Attorney,
Counsel of Record

T. DAVID HOUGHTON,
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

June 2006

APPENDIX TABLE OF CONTENTS

APPENDIX A

Letter to Supreme Judicial Court from Attorney James W. Stathopoulos, dated December 11, 2002 ..... 1a

APPENDIX B

Appellant's Motion to Enlarge Time filed with the Appeals Court, dated October 7, 2005 ..... 3a

APPENDIX C

Barnstable Superior Court Docket Entries 10a

APPENDIX D

Appeals Court Docket Entries 15a

APPENDIX E

Supreme Judicial Court Docket Entries 21a

APPENDIX A

Law Offices of
James W. Stathopoulos

All Correspondence to:

METRO NORTH
MAPLE STREET-ROUTES 128 @ 93
STONEHAM, MASSACHUSETTS 02180
TEL (781) 438-3661 FAX (781) 438-3205

METRO BOSTON
40 BROAD STREET, SUITE 805
BOSTON, MASSACHUSETTS 02109
TEL (617) 423-0001 FAX (617) 423-0009

METRO SOUTH-CAPE COD
MERCHANT SQUARE
SANDWICH, MASSACHUSETTS 02563
TEL (508) 888-0404 FAX (508) 833-0303

RECEIVED
DEC 26 2002
TOWN ATTORNEY
TOWN OF BARNSTABLE

December 11, 2002

Susan Mellen, Clerk
Supreme Judicial Court
1300 New Court House
Pemberton Square
Boston, MA 02108

RE: Gifford Brothers Sand and Gravel, Inc. v. Zoning Board of Appeals of Barnstable No. 2000-P-0701

Dear Ms. Mellen:

I received the Appeals Court decision in the above referenced matter on Tuesday, November 19, 2002 at my Boston office on Broad Street, the same address that I provided to the Appeals Court on the intake/appearance form provided to me on the day of argument. The decision had multiple postmarks and had been addressed to a Hyannis office that I had used thirteen years ago.

The Appeals Court (see attached Notice of Docket Entry) has allowed my Motion to Enlarge Time (also attached).

I am writing to confirm the above because at this time it is my intent to file a Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review. In order to properly comply with the requirements of said rules, I will require additional time in which to file the complete application for FAR. Having just received a copy of the transcript and briefs in this matter and with the upcoming holiday season and four school age children, I cannot see how I could possibly file the application prior to January 15, 2003 and intend to file same along with a Motion to Enlarge Time therefore, on said date.

I appreciate your assistance herein.

Sincerely,

James W. Stathopoulos

JWS/jw
CC: Ruth J. Weil, Esquire, Gregory M. Downs, Esquire

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

APPEALS COURT DOCKET #2000-P-0701
(SUPERIOR COURT DOCKET #98-87)

* *

GIFFORD BROTHERS *
SAND & GRAVEL, INC., *
APPELLANT *
*
V. *
*
TOWN OF BARNSTABLE *
ZONING BOARD OF APPEALS, *
APPELLEE *

* *

APPELLANT'S MOTION TO ENLARGE TIME

Now comes GIFFORD BROTHERS SAND & GRAVEL, INC., Appellant herein, and moves that this Court allow Appellant to enlarge the time for filing a MRAP Rule 27.1 Application for Further Appellate Review. As grounds herefor the Appellant states as follows:

1. Appellant's original Counsel Gregory Downs, Esquire, the attorney who actually tried the case in the Barnstable Superior Court, filed an appeal of the Superior Court Justice's decision which permitted Appellant to use only a portion of his property for commercial purposes.

2. Mr. Downs appealed that decision seeking a ruling that the entire property be commercially utilizable.

3. At the time of the trial and clearly by the time of the appeal to the Appeals Court Mr. Downs had been and is still suffering from a debilitating illness and is no longer able to practice law.

4. Christopher Keyes, President of Appellant Gifford Brothers prevailed upon Attorney James Stathopoulos, to assist Appellant and Mr. Downs by filing a Petition for Rehearing with the Appeals Court. Mr. Stathopoulos did so but without the benefit of Mr. Downs' files or assistance both of which were unavailable at the time, and the petition was denied.

5. Mr. Stathopoulos, upon the receipt of the notice of denial of the Petition for Rehearing attempted to file a request to enlarge time for the filing of an Application for Further Appellate Review but was informed by the Clerk's Office that such motions are not accepted except when simultaneously accompanied by the actual Application FAR itself.

6. Mr. Stathopoulos informed Appellant of the above and Appellant then retained successor counsel, Joseph Runci, Esquire for the purpose of filing the Application for FAR.

7. Attorney Runci informed Appellant that Runci had requested case files from Attorney Downs.

8. Mr. Downs, suffering from mental difficulties, initially provided nothing, procrastinated for months and avoided communication.

9. Benjamin Losordo, Esquire (Attorney Downs' former partner) though himself plagued by serious health problems (requiring multiple oncology-related hospitalizations and who is at this time in-patient at Brigham & Womens Hospital) was at that time still able to assist Mr. Downs in the process of locating Appellant's files in this matter.

10. Attorney Losordo, who has filed an affidavit in support of this motion attached hereto as Exhibit A, went to Mr. Downs' home on several occasions and eventually compiled a box containing what is believed to be the bulk of Appellant's files.

11. Mr. Lorsordo turned over possession of the said files to Appellant's successor Counsel, Joseph Runci, Esquire.

12. Appellant was under the assumption that Attorney Runci had filed an Application for FAR. Awaiting a decision, the Appellant has continued to operate his facility at the locus under the terms of the trial Judge's order and has done so with the full knowledge of the Appellee.

13. What work Attorney Runci (who at the time was leasing space in an office suite owned by Attorney Shaun M. Ellis in Sandwich, MA) actually performed, if any, is unknown.

14. On September 29, 2003, Attorney Ellis' wife and an employee both discovered Attorney Runci deceased, and locked in his office. As a result Ellis' office operated on a limited basis for several months until the attorneys and other staff were able to recover from the shock of what had occurred.

15. In July of this year after returning from a week's vacation Attorney Ellis discovered that his office condominium had been flooded. As a result of the cleanup that ensued Mr. Ellis discovered a box of files in the storage area of the cellar of his office that appeared to have been the box that was provided by Attorney Losordo to Attorney Runci. Mr. Ellis saw that Appellant's name was on some of the documents and contacted Appellant. Attached hereto as Exhibit B is Mr. Ellis' Affidavit.

16. Appellant directed Mr. Ellis to contact Attorney Stathopoulos and turn over the documents to Stathopoulos. The documents had an extremely high degree of water content and the vast majority were stuck together and very difficult to decipher.

17. Attorney Stathopoulos reviewed the contents of the box provided to him and came to the conclusion that the documents contained therein comprised the files that Mr. Downs had used at the time of the trial of this matter. There were no appellate documents of any kind.

18. Attorney Stathopoulos informed Appellant of these facts and Appellant requested that Attorney Stathopoulos file this Motion to Enlarge Time and the accompanying Application FAR.

19. The gravamen of the case is whether ongoing commercial operations at the locus owned by Appellant pre-existed Appellee's 1929 zoning ordinance.

20. The trial judge, a long-time attorney and resident of Cape Cod and a person himself familiar with the area of the locus found that there was a valid existing commercial use.

21. Attorney Downs had informed Appellant that the trial judge had suggested pre-trial that the Judge was not as concerned with the commercial status of the property circa 1929 but was more focused on the question of the type of commercial activity circa 1956, (a time when Appellee had enacted an even more comprehensive zoning ordinance/map) so that the Judge could make a determination regarding what portion of the locus on which he would allow certain uses.

22. Both trial attorneys and the Court therefore focused on the nature of the operations in place circa 1956 and not much evidence, for or against, was adduced by either party as to the status quo circa 1929. Moreover the trial Judge found the 1929 ordinance to be constitutionally defective.

23. The Appeals Court however, eventually determined the 1929 ordinance to be valid.

24. Appellant has researched and investigated the availability of living witnesses to corroborate the commercial operations ongoing at the locus (which was at one point comprised of land in both Barnstable and Sandwich) prior to the 1929 act.

25. Appellant has located Robert Ellis, a resident of Sandwich and a former Chairman of the Board of Health for that town (having been a member of the Board for over thirty years), who clearly remembered substantial

commercial operations at the locus, from 1924 to the present time. Robert Ellis' affidavit is attached to the Appellant's Application for FAR filed herewith.

26. Appellant also located Francis Rennie, a resident of the Town of Barnstable, who remembered substantial commercial operations at the locus since 1920 and who also knew the owner of the locus at the time of the Appellee's 1929 zoning enactment. Francis Rennie's affidavit is attached to the Appellant's Application FAR filed herewith.

27. It now appears that there are additional octogenarians who are of sound mind and good memory that will be able to corroborate the testimony of Mr. Rennie and Mr. Ellis. Current counsel is working diligently to compile a list of additional affiants who can testify to ongoing commercial operations at the locus pre-1929 to present.

28. The trial Judge found the commercial operations at the locus to be continuous and ongoing for his purposes.

29. There appears to be absolutely no doubt that the subject locus had ongoing and valid commercial uses pre-existing the Appellee's 1929 ordinance.

30. Were the Appellee to argue that this information is untimely the Appellant would suggest (a) the extreme incapacity and/or death of two of Appellant's prior attorneys should not be held against Appellant; (b) no party is prejudiced; (c) there are a significant number of living eye-witnesses that can corroborate the existence of pre-existing

commercial uses and (d) it would be unjust to deny the obvious truth of all of the above and allow clear error to become law.

31. It appears that justice would require the consideration of the Appellant's Application for Further Appellate Review coterminously filed herewith. The enlargement will allow the truth to come out and give Counsel the means to adequately and properly present the Appellant's issues to the Court.

Wherefore the Appellant request that this Court allow Appellant to enlarge the time for filing a MRAP Rule 27.1 Application for Further Appellate Review.

Respectfully submitted,

/s/ James W. Stathopoulos, Esquire
BBO#477480
Attorney for Appellant
43 Kingston Street
Boston, MA 02109
(617) 423-0001

Dated: October 7, 2005

APPENDIX C

GIFFORD BROTHERS SAND AND GRAVEL, INC.
vs.
ZONING BOARD OF APPEALS,
TOWN OF BARNSTABLE

Sandwich

$185 paid
$50 PI paid

Commonwealth of Massachusetts
Barnstable, SS
Superior Court for Civil Business

Counsel for Plaintiff

Gregory M. Downs
Losordo & Downs
P.O. Box 1637
78 Route 6A
Sandwich 02563
(508-888-6067)

Counsel for Defendant

Robert D. Smith
Ruth J. Weil
Town of Barnstable
367 Main Street, New Town Hall
Hyannis, MA 02601-3907
790-6280

ACTION AND DEMAND

Zoing Appeal/Declaratory Judgment

1998

Feb. 9, No. 1 – Complaint

Feb. 9, No. 2 – Plaintiff's statement pursuant to S.C. Rule 29

Feb. 20, No. 3 – Plaintiff's affidavit of notice pursuant to G.L. c. 40A, § 17

March 20, No. 4 – Appearance of Robert D. Smith and Ruth J. Weil for defendant

Oct. 15, No. 5 – Defendant's motion for preliminary injunction, memorandum in support, with affidavits in support

Oct. 15 – Order of notice issued returnable on October 22, 1998

Oct. 22, No. 6 – Defendant's affidavits (2) in support of #5

Oct. 22, No. 7 – Plaintiff's memorandum in opposition, with affidavits (2) in support of opposition of #5

Oct. 22 – Motion #5 allowed in accordance with paragraph one only to the description of property, by the Court, O'Neill, J.

Oct. 22, No. 8 – Interlocutory order on preliminary injunction, by the Court, (O'Neill, J.) (copy to attys.)

Dec. 16, No. 9 – Pre-trial conference scheduled for February 3, 1999, at 2:00 p.m., by the Court, Connon, J. (copies to atts.)

1999

Feb. 3, No. 10 – Pre-trial orde--joint pre-trial memo. filed; case assigned for trial on April 27, 1999, at 9:00 a.m.; by the Court, Connon, J. (copy to attys. 2/5/99)

March 31, No. 11 – Defendant's motion in limine with statement of reasons to exclude testimony of expert witnesses in support, plaintiff's opposition

April 27, No. 12 – Abutters motion to intervene as party defendants filed and denied, by the Court, Nickerson, J.

27, No. 13 – Trial without jury (Nickerson, J.)

27, No. 14 – Defendants' motion for view filed and allowed, by the Court, Nickerson, Jr.

25, No. 15 – Findings of fact, rulings of law, by the Court, Nickerson, J. (copies to attys.)

April 27, No. 16 – Defendants' request for findings of fact and rulings of law

July 21, No. 17 – Judgment on findings by the Court (copy to attys.)

26, No. 18 – Plaintiff's motion to reconsider, alter or amend judgment with opposition

August 2 – Motion #18 denied without prejudice, S. C. rule 26: Arthur D. Little Inc. v. East Cambridge Savings Bank 35 Mass. App. 734, 742; by the Court, Nickerson, J. (copy to attys. 8/5/99)

" 9, No. 19 – Plaintiff's motion to reconsider, alter or amend judgment with opposition and deft's memorandum in support of opposition

" 17 - Motion #19 denied, without prejudice, S. C. Rule 26 Arthur D. Little Inc. v. East Cambridge Savings

" 10, No. 20 – Plaintiff's notice of appeal (Mr. Justice Nickerson notified and copy to atty – 10/21/99)

"16, No. 21 – Defendant's notice of appeal (Mr. Justice Nickerson notified and copy to atty. 10/21/99)

November 15, No. 22 – Complaint for contempt, affidavit in support

November 17 – Summons to issue ordering plaintiff to appear for the purpose of holding a hearing on the merits of the contempt complaint, returnable at Barnstable, Wednesday, November 24, 1999, at 2:00 p.m., by the Court, Nickerson, Jr.

November 17 – Summons on complaint issued

December 12, No. 23 – Plaintiff's certificate re ordering transcript

December 19, No. 24 – Defendant's certificate re not ordering transcript

December 23, No. 25 – Civil contempt summons returned with service made on plaintiff and Christopher Keyes on Nov. 18, 1998

December 23, No. 26 – Answer to contempt complaint by Christopher Keyes, President of plaintiff corporation by Gregory M. Downs

December 23, No. 27 – Contempt hearing (Nickerson, J.)

Findings on contempt hearing on record

December 24, No. 28 – Judgment on contempt (copy to attys.)

2000

January 8 - No. 29 - Transcript of testimony (1 volume)

March 28, No. 30 - Transcript of testimony (2 volumes)

April 10 - Attorneys and Clerk of the Appeals Court notified record assembled in accordance with Appellate Rule 9.

A true copy, Attest:

/s/ Phyllis A. Day, Clerk

APPENDIX D

APPEALS COURT
Panel Cases
Case Docket

GIFFORD BROTHERS SAND & GRAVEL vs.
BARNSTABLE ZONING BD. OF APPEALS TOWN OF
2000-P-0701

CASE HEADER

Case Status	Closed: Rescript issued
Nature	Zoning appeal: c40A
Sub-Nature	declaratory judgment
Appellant	Both Plf & Deft
Brief Status	
Panel	Gelinas, Kantrowitz, Doerfer, JJ.
Citation	56 Mass. App. Ct. 1105
Lower Court	Barnstable Superior Court
Lower Ct Judge	Gary A. Nickerson, J.
Status Date	12/27/2005
Entry Date	04/20/2000
SJ Number	
Case Type	Civil
Brief Due	
Argued/Submitted	04/10/2002
Decision Date	10/28/2002
TC Number	98-87
TC Entry Date	02/09/1998

ADDITIONAL INFORMATION

FAR docket number is FAR-15086.

INVOLVED PARTY

Gifford Brothers Sand & Gravel
Plaintiff/Appellant
Blue brief & appendix filed
3 Extensions, 127 Days

ATTORNEY APPEARANCE

Gregory M. Downs, Esquire
James W. Stathopoulos, Esquire

INVOLVED PARTY

Barnstable Zoning Bd. of Appeals Town of
Defendant/Appellee
Red brief filed
1 Extension, 27 Days

ATTORNEY APPEARANCE

Ruth J. Weil, Esquire

DOCKET ENTRIES

06/01/2000 - **** Cross Appeal ****

10/04/2000 – Briefs located in Room 952: Cab 1; shelf 1.

04/20/2000, #1 – Entered.

05/30/2000, #2 – Motion to docket cross-appeal late, filed by Gifford Brothers Sand & Gravel.

05/30/2000, #3 – MOTION to extend brief & appendix due date, filed by Barnstable Zoning Bd. of Appeals Town of:

06/01/2000 – RE#2: The motion to docket the appeal late is allowed and the appeal of the plaintiff is entered this date. Pursuant to Mass.R.A.P. 16(i), the plaintiff

shall be deemed the appellant unless the parties otherwise agree. Appellant's brief & appendix are due 6/30/00. (Lenk, J.) *Notice.

06/02/200 - RE:#3 See this court's action of 6/1/2000 on paper #2. *Notice.

06/05/2000, #4 - Response to #2, filed by Barnstable Zoning Bd. of Appeals.

06/08/2000 - RE#4: The within is treated as a motion for reconsideration and is denied. (Lenk, J.) *Notice.

06/21/2000, #5 - Joint motion to enlarge time for filing briefs.

06/21/2000 - RE#5 The appellant shall file the brief & appendix on or before 8/29/00. No further enlargements. The appellee's request for enlargement is denied without prejudice to refiling after the appellant files the brief & appendix. Notice.

09/08/2000, #6 - Letter from Atty Weil re: Status of case.

09/08/2000 - RE#6 The time period for appellee's due date does not begin to run until the appellant's brief & appendix are accepted & docketed. Notice.

09/21/2000 - Notice preceding dismissal: Rule 17A.

10/04/2000, #7 - MOTION to extend conforming brief & conforming appendix due date, filed by Gifford Brothers Sand & Gravel, Inc.

10/04/2000 - RE#7: Allowed to 10/04/2000. *Notice.

10/04/2000, #8 - SERVICE of brief & appendix for Plaintiff/Appellant Gifford Brothers Sand & Gravel (2 vols appx and 1 vol exhibits).

10/10/2000, #9 – RESPONSE to paper #7 filed by Zoning Board of Appeals, Town of Barnstable.

10/16/2000, #10 – MOTION to extend brief due date of Town of Barnstable Zoning Bd. of Appeals.

10/20/2000 – RE#10: Extension to 11/30/2000 granted for filing of brief of Barnstable Zoning Bd. of Appeals Town of, Defendant/Appellee. Notice to counsel.

10/20/2000 – RE#9 Treating the within as a motion to strike pages E5 and E6 of the appellants' Exhibit volume for the reason that the documents are not part of the record below and to correct the date on pages E23 and E24 from 1955 to 1968, it is referred to the panel assigned to decide the appeal. *Notice.

11/30/2000, #11 – SERVICE of brief for Defendant/Appellee Barnstable Zoning Bd. of Appeals Town of.

03/19/2002, #12 – Notice of 04/10/2002, 9:30 A.M. argument sent.

03/21/2002, #13 – Letter pursuant to MRAP 16(l) filed by Barnstable Zoning Bd. of Appeals.

04/10/2002 – Oral argument held. (GS KN DO).

10/28/2002 – RE#9 (Revised Action). Allowed. (Gelinas, Kantrowitz, Doerfer, JJ.) *Notice.

10/28/2002, #14 – Decision: Rule 1:28 (GS KN DO). The judgment of the Superior Court is modified by striking the clause in paragraph 1 that begins with "except" and ends with "1956." As so modified, the judgment is affirmed." *Notice. (See image on file.)

11/18/2002 – Mail to Atty Stathopoulos returned – resent to new address.

11/25/2002 – RESCRIPT to Trial Court.

11/26/2002, #15 – Letter from James W. Stathopoulos, Esquire re: received decision on 11/19/02; and require the benefit of the full 14 and 20 day periods to file Petition for Rehearing and Further Appellate Review.

11/27/2002 – RE#15 Either a M.R.A.P. 27 or 27.1 filing should be accompanied by a motion to enlarge setting out the within, note the rescript issued to the trial court on 11/25/02. *Notice.

12/09/2002, #16 – Motion to enlarge time for filing an MRAP Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review, filed by Gifford Brothers Sand & Gravel.

12/10/2002 – RE#16 Appellant may file his petition for rehearing on or before 12/19/02. Any request for an enlargement of time to file an application for F A R must be made to SJC. (Gelinas, Kantrowitz & Doerfer, JJ.) *Notice.

12/20/2002, #17 – PETITION for Rehearing, filed by Gifford Brothers Sand & Gravel.

01/09/2003, #18 – ORDER: Denial of petition for rehearing. (GS-KN-DO, JJ.) *Notice/Image.

10/27/2005 – Copy of FAR application of Gifford Brothers Sand & Gravel.

12/27/2005 – FAR DENIED (on 12/21/05).

APPENDIX E

SUPREME JUDICIAL COURT
For the Commonwealth
Case Docket

GIFFORD BROTHERS SAND AND GRAVEL, INC. vs.
ZONING BOARD OF APPEALS OF BARNSTABLE
FAR-15086

CASE HEADER

Case Status	FAR denied
Nature	Zoning appeal: c40A
Appeals Ct Number	2000-P-0701
Appellant	Both Plf & Deft
Citation	45 Mass. 1109
Full Ct Number	
Lower Court	Barnstable Superior Court
Status Date	12/21/2005
Entry Date	10/07/2005
Opposition Date	
Applicant	Plaintiff
Case Type	Civil
TC Number	98-87
Lower Ct Judge	Gary A. Nickerson, J.

INVOLVED PARTY

Gifford Brothers Sand & Gravel
Plaintiff/Appellant

ATTORNEY APPEARANCE

James W. Stathopoulos, Esquire
Gregory M. Downs, Esquire

INVOLVED PARTY

Barnstable Zoning Bd. of Appeals
Defendant/Appellee

ATTORNEY APPEARANCE

T. David Houghton, Esquire
Robert D. Smith, Esquire
Ruth J. Weil, Esquire

DOCKET ENTRIES

10/07/2005 – Docket opened.

10/07/2005, #1 – MOTION to file FAR application late, filed for Gifford Brothers Sand & Gravel by James W. Stathopoulos, Esquire. (Referred to the justices) Notice sent.

10/07/2005, #2 – FAR APPLICATION of Gifford Brothers Sand & Gravel, filed by James W. Stathopoulos, Esquire.

10/24/2005, #3 – OPPOSITION to Paper #1 (Appellants' motion to file FAR application late), filed for Barnstable Zoning Bd. of Appeals Town of by T. David Houghton, Esquire, Robert D. Smith, Esquire, Ruth J. Weil, Esquire. (Referred to the justices) Notice sent.

10/27/2005, #4 – Additional copies of the appellant's FAR application received this date. Only one copy was filed on 10/7/05.

11/03/2005, #5 – Additional copies of Appellee's Opposition to Motion to Enlarge time.

11/30/2005, #6 – Action on application deferred. (RA and Briefs requested from Atty. Stathopoulos.)

(12/13/05: Materials received from Atty. Stathopoulos.) 12/28/05: Materials returned to Atty. Stathopoulos.)

12/21/2005, #7 – DENIAL of FAR application.